

The Interim Protection of Individuals before the European and National Courts

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ABSTRACT

This thesis focuses on the interim protection of the individual in the Community legal order. An analysis will be made of the avenues available to individuals for requesting interim relief when a case is brought before the European or the national courts. An extensive examination of the relevant case law will be performed to reveal what appears to be an evolving concept of the individual's interim protection in the European Community structure and to suggest any possible changes in order to guarantee an effective remedy of interim relief.

Therefore the analysis starts with the examination of applications for interim relief before the European courts, as provided by Article 242 and 243 EC Treaty. In order to comprehend the function and effectiveness of interim relief it is essential to illustrate the nature of such protection in a European legal system. Furthermore through an exhaustive number of cases it is going to be clarified, whether the conditions for interim relief provided by the Treaty focus on the protection of the individual's Community rights or whether the European courts have minimised the number of successful applications for interim relief.

This thesis then proceeds by analysing in detail the complex situation where individuals seek to protect provisionally their Community rights before a national court. This research begins by outlining the extensive case law of the ECJ on the judicial protection of Community rights before national jurisdictions. It continues by examining in depth the important cases of the European and national courts (*Factortame*, *Zuckerfabrik*, *Atlanta*), which developed the concept and the conditions of interim relief before national courts. Through this analysis it is going to be shown that it is difficult to suggest that the individual's protection before national courts has been effectively prompted.

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It goes without saying that all errors, omissions and opinions are, of course, mine alone.

INTRODUCTION

The purpose of this thesis is to critically examine the efficacy of interim protection of the individual in litigation concerning EC measures. In particular, the position of the individual in the Community legal order and the effective judicial protection of his rights will be the yardsticks for any conclusions that will be given on the effectiveness of interim protection of individuals' Community rights. To this end, the analysis will focus on the different avenues available for an individual to request interim relief when Community rights are at stake and an extensive examination of the relevant case law will be undertaken. The goal is to reveal the evolving concept of interim protection of individuals' rights in a mature EC legal order, and to suggest any future amendment of the Treaty, as well as any harmonisation of procedural rules, which could promote the effective interim protection of Community rights.

To facilitate a full understanding of this complex subject, the main body of the thesis is divided into two parts, both of which clarify and justify the potential anomalies and inconsistencies of the system of interim relief of individuals in the European Community. This division mirrors the principle developed in European law, whereby a partnership is formed between the European Courts and the national authorities in the various Member States. From some of its earliest case law, notably *Van Gend en Loos*¹ the European Court of Justice (ECJ) laid the foundations for the major impact that Community law would have in the national legal systems by highlighting the crucial role of national courts in securing the effective protection of Community rights. Working alongside the European Courts, who have the important task of reviewing the legality of Community measures and protecting the rights of interested parties, national courts also play a significant role in the battles for judicial review and effective national remedies for the protection of individuals². Because of the remaining uncertainties of the European Courts' power to protect Community rights and of the far reaching effects of Community law in national procedural systems, this thesis is founded on two different levels. Firstly there is the case, where a private applicant brings proceedings before the European Courts. Secondly the

¹ Case 26/62 *Van Gend en Loos* [1963] ECR 1

² D. Curtin and K. Mortelmans, *Application and Enforcement of Community Law by Member States: Actors in Search of a Third Generation Script in Institutional Dynamics of European Integration*, *Essays in Honour of Henry G. Schermers*, Vol. II, edited by D. Curtin and T. Heukels, 1994, p. 425

analysis proceeds to the situation where a private applicant is seeking to protect provisionally his rights deriving from Community law before a national court.

Although there have been numerous essays written on procedures offered in the judicial system of the European Community, the analysis goes a step further. It recognises the important position that individuals possess in the Community, as well as the consequences that legislative measures and court judgments can have on the protection of individuals' Community rights³. Through this particular approach, it will be shown how fragmented the treatment of individuals is in the European Community. Although the individual can be considered a subject of Community law under the principle of direct effect and as a citizen of the Union under the TEU, nevertheless the development of Community law as regards his judicial protection has not been linear. This piecemeal evolution of the role of individuals is the result of the Court of Justice's struggle to overcome the inherent uncertainties of the Treaty throughout the years, even if there have been a number of cases which dictated an essential reassessment of how the individual should be treated before European and national courts in proceedings concerning Community rights.

It is in this group of cases, which deal with the protection of individual rights, that interim relief proceedings are an excellent paradigm for the understanding of the difficulties that individuals face when bringing proceedings before the European and national courts when claiming the provisional protection of Community rights. Furthermore, it is through this group of cases that one realises that there is still plenty of room for improvement as regards the principle of effective judicial protection.

Firstly, the existence of the principle of temporary judicial protection, as an essential aspect of the judicial structure of the various national and European legal systems, is fundamental for the understanding of the consequences that such procedure has on individuals, who seek to protect their rights provisionally. Thus, as a solution to the inevitable delays of the judicial system, all legal orders introduced the right to request the provisional protection of putative rights, pending final judgment. Temporary judicial protection is part of the basic human right to claim a right before a court and ask for a judgment to protect it. This goal of guaranteeing an award of justice can be located in all judicial systems.

³ For an analysis on private parties in the European Community see A. Albers-Llorens, *Private Parties in European Community Law*, Clarendon Press, 1996; A. Ward, *Judicial Review and the Rights of Private Parties in EC Law*, Oxford University Press, 2000

In particular interim relief proceedings have been introduced in the European judicial system under expressive provisions in the Treaty and the Rules of Procedure. The non suspensory effect of all actions brought before the European Courts as well as the immediate enforceability and applicability of Community measures justified the appearance of interim relief as the fundamental safeguard of all rights of individuals against the power of Community institutions to adopt measures affecting them. Articles 242 and 243 EC Treaty provide that the suspension of the application of a Community act and any other necessary interim measures can be granted in order to provisionally protect the rights of the interested parties⁴. Through this procedure the Court of Justice has the power, when conditions and circumstances allow, to intrude into the decision-making capacities of the European Institutions in order to protect “private” interests against the administration of the European Community. However, potential of this power has been mitigated somewhat since, on investigation it seems that the European Courts pay more attention to the Community interest and the immediate execution of Community measures, rather than using interim relief as an instrument of defence for individual parties.

The conditions for granting interim relief before the European Courts are expressively provided for by the relevant provisions. The private applicant needs to show that there is a *prima facie* case both for the main action as well as for the application for interim relief. Furthermore, the applicant needs to demonstrate that there is a degree of necessity, as a matter of urgency, to adopt interim measures in order to avoid serious and irreparable damage to his interests. Finally, the European Courts will proceed to a balance of interests test in order to decide whether interim relief should be granted or not. An examination of the European Courts’ interpretation of these conditions shows the difficulties that individuals face, when they make an application for interim relief. In particular, the European Courts have established stringent criteria when dealing with the ancillary nature of the interim relief application and the *prima facie* case that private applicants need to establish before them. The examination (or not) of the admissibility of the main action from the judge hearing the application of interim relief, the notion of the “manifestly” inadmissible main action and the meaning of *fumus boni iuris* are issues that the European Courts

⁴ Article 242 EC Treaty reads as follows: *Actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended.* Article 243 EC Treaty reads as follows: *The Court may in any cases before it prescribe any necessary interim measures.*

has tried to solve through its case law. Nevertheless there remain many ambiguities as to how the judge should proceed. Furthermore, a large number of cases show the European Courts' diverse interpretation of the requirements of urgency and of serious and irreparable damage. Finally, the balance of interests test is the "additional" criterion that the European Courts use for giving a decision to an application for interim relief. Examining the case law, it is not easy to identify a specific approach that the European Courts use. However, it becomes evident from the cases that this condition, which is not set out in the relevant provisions, creates an additional burden for the applicant and jeopardises his right to effective judicial protection. Thus, a new provision must aim to set out the conditions for the application of the balance of interests test and the factors to take into account. It is only by proceedings in this way that a uniform interpretation of the test can be achieved. Moreover, the European Courts must put to one side the condition of serious and irreparable damage and depend upon the question as to which interests should be primarily protected in the specific application for interim relief.

The ancillary nature of interim relief emerges clearly from Articles 242 and 243 EC Treaty, which allow the suspension of the "contested act" and permit only the grant of interim measures in cases before the European Courts. In principle, an application for interim relief may be made after a direct action has been brought before the European Courts. Thus its admissibility depends upon the admissibility of the main action. This relationship between the two proceedings creates uncertainties with regard to the effectiveness of the judicial protection of the individual's Community rights. In particular, the strict conditions that individuals face when bringing an action for annulment under Article 230(4), have significant impact on an incidental application for interim relief⁵. The European Courts offer a large number of cases on the *locus standi* requirements that individuals need to fulfil when applying for the annulment of a Community measure. The same requirements apply when individuals seek the provisional protection of their putative rights. Such connection can be seen through the parallel examination of the European Courts' approach to cases dealing with direct actions and applications for interim relief brought before them. The requirement of "direct and individual concern" and its interpretation in

⁵ Article 230(4) EC Treaty reads as follows: *Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.*

cases such as *Plaumman*⁶, *Cordoniu*⁷, *Extramet*⁸, *UPA*⁹ shows just how substantial the barrier is for the development of Article 230(4) EC Treaty. The requirement also hinders the effectiveness of any other incidental remedy, namely the application for interim relief under Articles 242 and 243 EC Treaty. It was in *Jego-Quere*¹⁰ that a new formula was proposed that relaxed the standing requirements. Nevertheless, the European Courts fought against the loosening of the requirements and the traditional formula is still very much in place¹¹. In applications for interim relief individuals still need to overcome the obstacle of admissibility before having the opportunity to argue on the urgency of the case and the damage that they might suffer should interim relief be refused. Without any future amendment of the Treaty provisions and failing any willingness on the part of the European Courts to be more open-handed to private applicants, applications for interim relief will continue to be dismissed as inadmissible. The Court will be prevented from dealing with the substantive issues of the case. However there have been some proposals introduced in the Draft establishing a Constitution for Europe that can prove effective for the judicial protection of individuals' Community rights.

Apart from an available remedy before the European Courts, interim relief is a fundamental aspect of the effective protection of Community rights before national jurisdictions. The development of interim relief before national courts is part of the European Courts' concern with the interests of the individual and the need for an effective remedy when application and enforcement of Community measures in national jurisdictions are at issue¹². Of even more significance, however, for the purposes of the present thesis, are the means used by the European Courts to justify the infiltration of Community law into the national legal systems. In a number of cases beginning in the early developmental years of the European Community, the European Court of Justice progressively recognised that individuals were to play a significant role in the realisation of the objective of the Treaty by conferring upon them Community rights and by imposing an obligation on the national judges to

⁶ Case 25/62 *Plaumman v. Commission* [1963] ECR 95, para. 107

⁷ Case C-309/89 *Cordoniu v. Commission* [1994] ECR I-1853, para. 20

⁸ Case C-358/89 *Extramet Industrie SA v. Council* [1991] ECR I-2501, para. 16

⁹ Case C-50/00P *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677, para. 44

¹⁰ Case T-177/01 *Jego-Quere and Cie SA v. Commission* [2002] ECR II-2365, para. 51

¹¹ Case C-50/00P *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677

¹² A. Barav, *Enforcement of Community rights in the national courts: The case for jurisdiction to grant an interim relief*, (1989) 26 CML Rev., p. 384

effectively protect them¹³. Since the Community does not have a harmonised procedural law or law governing the protection of Community rights before national courts, the concept of full effectiveness of EC law has had to be developed on a case-by-case basis by the European Courts. Nevertheless the European Courts have not been linear with regard to the effective protection of individuals, leaving a big margin for criticism.

As a result the balance between ensuring the full application of Community law before national courts and national procedural rules is an onerous task. Although Member States possess procedural autonomy, even when concerned with the effective protection of Community rights, the European Court of Justice laid down important constraints and minimum standards for the application of national procedural rules. In a number of cases (second generation case law) the Court of Justice adopted a minimalist approach towards national procedural law and stated that there was no intention of creating new remedies in the national jurisdictions for the protection of Community rights¹⁴. National procedural rules would only apply for the protection of Community rights if they were not less favourable than those available in similar domestic cases (principle of equivalence) and if they did not render the exercise of Community rights impossible, or excessively difficult (principle of effectiveness)¹⁵. The Court of Justice's concern with the efficacy of national remedies was demonstrated in a number of cases, where the requirement of effective protection of individuals was considered a general principle of law¹⁶. Finally, in the early 90s, the European Court of Justice took a more intrusive approach and a number of judgments (third generation case law) proved to be a significant incursion into national procedural autonomy¹⁷. Indeed, these developments led to further speculations on the soundness of the European Courts' interpretation. They should be carefully examined in order to comprehend the fundamental consequences that they have on the protection of individuals.

¹³ Case 6/64 *Costa v. ENEL* [1964] ECR 585, Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A* [1978] ECR 629

¹⁴ Case 158/80 *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel* [1981] ECR 1805

¹⁵ Case 33/76 *Rewe-ZentralfinanzG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, Case 45/76 *Comet v. Produktschap voor Siergewassen* [1976] ECR 2043

¹⁶ Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651

¹⁷ Case C-208/90 *Emmott v. Minister of Social Welfare* [1991] ECR I-4269, Case C-213/89 *R v. Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433, Joined Cases C-6/90 and C-9/90 *Francovich and Others v. Italian State* [1991] ECR I-5357

An examination of the cases dealing with interim relief proceedings before national courts can only be more valuable, if one keeps in mind the general approach that the European Court of Justice adopted for the reinforcement of the effective protection of individuals before national courts. *Factortame*¹⁸, *Zuckerfabrik*¹⁹ and *Atlanta*²⁰ are the principal judgments on the matter and, for the purposes of this thesis, they are analysed in depth. Although each case is based on different facts²¹, and deals with diverse legal issues of interim relief, a horizontal analysis proves effective in demonstrating the particular implications and consequences that this group of cases has on the formation of a uniform and effective system of interim protection of individuals' Community rights. The European Court of Justice had the ideal opportunity to establish interim relief as part of the principle of effectiveness of Community rights, and imposed on the national courts the new power to provisionally protect these rights. However, it will be shown that the creation of this new power has by no means been an easy task. In *Factortame* the European Court of Justice delivered a laconic judgment and a number of issues were indeed left open. The Court underestimated the importance of the preliminary questions and approached the case as a simple matter of Community law supremacy. In order to comprehend the magnitude of *Factortame*, as the *locus classicus* of interim relief, it must be understood that the European court did not just oblige the national judge to set aside a national rule which prevents him from granting interim relief. It also gave him the power to grant interim relief based on the principle of effectiveness of EC law. The national court will grant interim relief, if it is required to do so by Community law, even if national law does not purely empower it to do so. It was in *Zuckerfabrik*, and later on reiterated in *Atlanta*, that the European Court of Justice went a step further and established a new period focused on the need to effectively protect individuals' Community rights. It recognised a new competence for national courts to suspend a Community measure and order any other "positive" interim measures. It becomes evident that the means utilised by the European Court of Justice to justify the right of

¹⁸ Case C-213/89 *R v. Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433

¹⁹ Joined Case C-143/88 and C-92/89 *Zuckerfabrik Suderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH and Others v. Hauptzollamt Paderborn* [1991] ECR I-415

²⁰ Cases C-465 and C-466/93 *Atlanta Fruchthandelsgesellschaft and Others v. Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761

²¹ The facts of the *Factortame*, *Zuckerfabrik* and *Atlanta* disputes can be found in Chapter IV, footnotes 9-11, 14.

individuals to obtain interim relief are very much related to the need for a coherent system of interim relief in the Community legal order.

Apart from clarifying the new Member States' competence to grant interim relief, *Factortame*, *Zuckerfabrik* and *Atlanta* began the process of "communitarisation" of the conditions which national courts need to apply when exercising their new power. In *Factortame* it was interesting that the European Court of Justice did not answer the question posed by the English courts regarding the criteria for the granting of interim relief. It will be shown that this silence could be a confirmation of the Court's view that national procedural rules should continue to apply. However, it should be accepted that *Factortame* could be considered as a turning point in the long lasting principle that the Court introduced in previous cases. In a number of cases it was stated that there was no intention of creating new remedies in the national jurisdictions²². For a better understanding of the Court's intention, *Factortame* is analysed in relation to the subsequent judgments in *Zuckerfabrik* and *Atlanta*, where the Court introduced a set of conditions based on the argument that national procedural autonomy was not at stake, as both cases concerned the Community legal order itself. The national judge, who suspends a Community measure or prescribes positive interim measures, becomes a Community judge and he is obliged to examine whether the uniform conditions, set out in *Zuckerfabrik* and *Atlanta*, are fulfilled. These conditions reflect the intrusive approach that the European Court of Justice adopted and they certainly promote the uniform application of Community law. Nevertheless, they have left a number of uncertainties in regard to their interpretation and their implications on the effective protection of individuals. For example, what is the true nature of the new obligation to make a preliminary reference before granting interim relief? Or, what is the real meaning of the serious doubts as to the validity of a Community act that the national court needs to entertain? Under which criteria should the national court take the Community interest into consideration? Are these conditions advancing the interim protection of individuals or are they making it stricter? Subsequent cases²³ prove that national courts are willing to apply the principles of *Factortame*, *Zuckerfabrik* and *Atlanta*. However, further

²² Case 158/80 *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel* [1981] ECR 1805

²³ *R. v. Secretary of State for the national Heritage, ex parte Continental Television BV* (1993) C.M.L.R., 387; *R. v. Secretary of State for Health and Others, ex parte Imperial Tobacco Ltd and others* (2000) 1 AllER 572

analysis disputes whether the reinforcement of the judicial protection of individuals has been effectively achieved²⁴.

It is accepted that individuals can apply for interim relief before both European and national courts. Hence, it is debatable whether the current system of interim protection is effective. It is important to examine the relationship between the European and national courts in their action taken to grant interim relief and reconsider whether the guidelines adopted by the European Court of Justice are consistent with the principle of effective judicial protection. The key issue is to clarify whether the individual has the maximum number of remedies available to protect his Community rights, irrespective of whether this going to happen on a European or national level. This question can be answered if one examines the relationship between direct actions before the European Courts and the preliminary reference procedure under Article 234 EC Treaty. Furthermore the interim relief system of *Factortame*, *Zuckerfabrik* and *Atlanta* needs to be reconsidered. It is evident that the issue of interim relief before national courts can arise in two different situations: when the validity of a national measure implementing a Community measure is challenged, and when the compatibility of a national measure with Community law is challenged. However, this distinction is fundamental since it clarifies the particularity of each application for interim relief and shows that the European Court of Justice should have dealt with each one separately. This thesis shows how the harmonised system for interim relief, introduced by *Zuckerfabrik* and *Atlanta*, creates ambiguities as to how the cases on compatibility issues can be dealt with same conditions as the cases on validity issues.

It will be concluded that the new system of interim relief has not incorporated any safeguards for the equal treatment of individuals. The European Court of Justice's judgments created unequal situations not only between individuals of different Member States but also between individuals of the same country. The Court tried to create an analogy with the interim relief proceedings under Articles 242 and 243 EC Treaty in order to rule on the new power of national courts and the conditions to grant interim relief. Such approach does not seem the ideal solution for the creation of an effective system of interim protection of individuals. It reinforces the phenomenon of

²⁴ Case C-68/95 *T.Port GmbH v. Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065, Case C-334/95 *Krüger v. Hauptzollamt Hamburg-Jonas* [1997] ECR I-4517, Case C-17/98 *Emesa Sugar (FreeZone) NV v. Aruba* [2000] ECR I-675

double standards and allows the existence of two different regimes to provisionally protect individuals' Community rights before the European and national courts. The European Court of Justice attempted to place the individual in a prime position when Community rights are at stake. However the result has been a system which considers the uniformity of all Community measures as the most important principle. It is therefore important to reach a solution where a new set of harmonised rules, at both European and national level, can prioritise the effective interim protection of individuals, which is a fundamental objective for the European legal order.

CHAPTER I

NATURE AND SIGNIFICANCE OF INTERIM RELIEF

I.1) The principle of temporary judicial protection

“Juger bien c’est, avant tout, juger vite”.¹ The principle of effective judicial protection, as it has been developed in several Member States as well as in the Community legal order², provides individuals with the right to obtain effective judicial review before all competent courts³. However as a fundamental principle the judicial protection of rights includes several aspects, which need to be guaranteed in order to be considered effective enough for any interested individual⁴. Judicial protection needs to be not only adequate, but also effective, in other words to be provided in good time and in appropriate way, in order to assure the right award of justice. This exact prerequisite of effectiveness, established in all legal orders⁵, creates the logical and legal need to include the temporary judicial protection in the wider fundamental right of judicial review.

Starting from the basic notion of justice, it is obvious that all citizens being part of a society have the right to claim their rights before the judicial authorities and have the right to ask from the competent authorities to make a just judgment on their contested right. Basing the notion of justice⁶ on the finding of the truth and the application of law in ascertaining a case, it is for the judge to look at all facts and apply them to rules of law in order to achieve the just result, which would be the effective protection of the right in question. In achieving the truth it is for the legislature to form the adequate procedure in order to prevent any potential injustice, which might lead to inaccurate decisions. This is the point where justice and procedure become unified. If justice is perceived as the result of a logical process,

¹ R. Chapus, *Rapport de synthèse du colloque du 30ème anniversaire des T.A.*, Grenoble, 1984, p. 341

² Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23, Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paras 18-20, Case 22/86 *UNECTEF v. Heylens* [1987] ECR 4097, para 15

³ T. Tridimas, *The General Principles of EC Law*, Oxford University Press, 1999, p. 290

⁴ A. Pliakos, *Le principe général de la protection juridictionnelle efficace en droit communautaire*, Sakkoulas/Bruylant, 1997, p. 68

⁵ See also Article 6 and 13 ECHR

⁶ A.A.S., Zuckerman, *Quality and Economy in Civil Procedure- The Case for Commuting Correct Judgments for Timely Judgments*, O.J.L.S., Vol. 14, No3, p. 354

procedure is the method, with which such a result can be achieved. A just system of judicial protection should include a complete system of procedure enabling the legal authorities to use and apply it in all future cases and protect all litigants' substantive rights in a uniform and effective manner.

A just procedure aiming for a just result is the ideal system embodied in a legal society. But, it would be erroneous to consider that in such a system problems will not arise. In a complex system, there are always rules, which in certain circumstances may not respect fundamental principles, such as equal treatment and impartiality,⁷ thus creating an obstacle to the achievement of an effective, final judgment.

Length of procedure is something that impacts greatly on the effectiveness of judicial protection. Time is considered to be a notion with a strong effect to the effectiveness of judicial protection⁸. Time has both a positive as well as a negative effect. Therefore in relation to justice, time may prove to be a factor for correct as well for wrong results. In order for a judgment to have a positive effect for the protection of the rights in question, the judge needs time to examine all the evidence brought before the court and analyse all the facts in order to avoid potential errors of judgment. A serious investigation of facts and a detailed use of all available evidentiary material needs time so it can be effectively applied to the rules of law in order to produce the correct final decision. The importance of time in this process is apparent, and, more precisely, it should be emphasized that a careful, accurate and effective result sometimes needs more time than expected. Regarding the notion of procedure, time is very important. The majority of the detailed rules of procedural law, especially those concerning the procedure before the court and those referring to the rules of evidence show the significance that time has. A just procedure is the one, which gives the opportunity to the parties to use all available remedies and rights it confers to them. Such opportunity though takes time and more exhaustive investigation from both sides-judge and litigants. Therefore the delay, which is apparent in the judicial system of all legal orders, is justified through the necessity of a detailed procedure offering an extensive number of remedies and rights of which the interested parties (plaintiff and defendant) can take advantage for the accurate and just protection of their claims.

⁷ A.A.S Zuckerman, *Interlocutory remedies in Quest of Procedural Fairness*, M.L.R., 1993, p. 326

⁸ S. De la Sierra, *Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right of Effective Court Protection. A Comparative Approach*, ELJ, Vol. 10, No. 1, January 2004, p. 51

However time in relation to justice and procedure is more likely to be considered as a restraint to the judicial system. It is true that justice delayed is justice denied.⁹ From this point of view, time is equal to delay in the sense that it can undermine the effectiveness and adequacy of a judgment. In a system of judicial protection and more specifically in a case brought before a court, delay may exacerbate the amount of errors. If one looks at the rules of evidence, delay may cause the loss of facts or, at the very least, mean that evidence provided is worthless. Therefore, in such a situation, the judgment given by the court cannot be effective for the rights in question. A judgment, which is finally given after a long period of time, contains the risk of being pointless, as its practical protection would be of no importance for the parties. At this point the judge has to face the dilemma as to whether the main aim of the judicial system is just the correct application of facts to the rules of law, even if this result is given with delay, or whether the court needs to focus on the effect that this correct decision will have on the parties, even after the passing of many years. The right answer to this dilemma would not be to reject either of the two options. A perfect judicial system should combine the right application of the rules of law with a procedure, which should not be time consuming, so as to safeguard the accuracy and effectiveness of the judgment. However when applying this model to current cases it is clear that not all judgments can be given in a short space of time and there are procedures which systematically allow delays. Time, even if it is often more of a negative ingredient in the judicial system, is of essential significance for the principle of effective protection of rights and hence more attention should be paid on how to harness its positive values.

At this stage it is fundamental to mention that the European Convention on Human Rights as well as the Charter of Fundamental Rights of the European Union refer to the reasonable time requirement in a case dealing with the protection of human rights. They both stipulate that the hearing of the case by the court must take place “within reasonable time”¹⁰. The European Court of Human Rights has

⁹ P.Estoup, *Le référé, verdict de culpabilité*, G.P., 1988, doc., p. 203.

¹⁰ Article 6(1) ECHR reads as follows:

In the determination of his civil obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. Article 47 of the Charter of Fundamental Rights reads as follows: *Everyone whose rights and freedoms guaranteed by the law of the Union has the right to an*

determined in several cases whether the length of the period of specific proceedings satisfy the requirement of reasonableness¹¹. When assessing the length of a period of proceedings the Court will examine the complexity of the particular case, the conduct of the applicant and of the relevant authorities¹². The reasonable-time requirement cannot be judged in abstract but has to be assessed in view of the circumstances of each case. The parties have the right to a final judgment within a reasonable time, as extensive delays may harm the chance of a fair trial as well as the principle of legal certainty.

It would be an endless task to try to reform the judicial system of a legal order in order to deal with the problem of time consuming procedures and judgments. As a solution to this delay all legal orders have introduced into their judicial systems the principle of temporary judicial protection, according to which the judge has to deal with the protection of the parties' rights in a provisional and limited way, until final judgment has been given in the future¹³. Interim relief deals with situations where one party proposes to make use of a right, which according to the applicant threatens to violate his/her rights until the court has had time to deliver the final judgment. In such cases the judge faces the following problem: on the one hand the judge can refrain from granting interim relief until the applicant's putative right has been established by the final judgment. Such judicial inactivity may result in the loss of the practical purpose of the applicant's entitlement and make the final judgment of no use to him/her¹⁴. On the other hand, if the judge does order interim relief there is the danger, if the final judgment establishes the defendant's claim, that the defendant is prevented from exercising his/her right during the time the interim measure is enforceable. Therefore, the role of temporary judicial protection is the minimisation of the risk of

effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

¹¹ See F. Jacobs and R. White, *The European Convention on Human Rights*, Clarendon Press, 1996, p. 142-145. They specifically state that there are more cases on what constitutes judgment within a reasonable time than on any other aspect of the Convention.

¹² See for example *Deumeland v. Germany* (1986) 8 EHRR 448, *Lechner and Hess v. Austria* (1987) 9 EHRR 490; *Silva Pontes v. Portugal* (1994) 18 EHRR 156. For an analysis on the case law of the Court on this issue see P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, Third Edition, 1998

¹³ J. Cavallini, *Le juge national du provisoire face au droit communautaire- Les contentieux français et anglais*, Bruylant Bruxelles, 1995, pp. 12-18

¹⁴ A.A.S. Zuckerman, *supra* n° 6, p. 367

potential damage to lawful rights. This aim means that the court will protect the object of the dispute in order to ensure that the passage of time needed by the court to deliver a final judgment does not end up in depriving the right of its substance¹⁵.

The particular task of the judge, in dealing with an application of interim relief is protecting the interests of the parties, such interests deriving from a right which has not yet been established. Interim relief does not aim to preserve the status quo until the court has been able to settle the dispute with its final judgment. As long as the rights are not yet established, any decision of granting or refusing interim relief will disturb the legal situation that existed prior to the particular application before the court. The underlying conflict of interests between the parties will often mean that the interim measure granted may protect the right of one party (for example the plaintiff) and at the same time altering the status quo for the other (for example the defendant)¹⁶.

The significance of interim relief derives from its provisional nature and its close link with the necessity of avoiding irreparable harm to the parties' interests which derive from putative rights. In an application for interim relief the judge's aim is clearly different from that in a main action. In the latter the judge tries to declare whether the applicant's claim is well founded in relation to the right that he/she pleads. In contrast, in proceeding for interim relief, the judge's decision does not relate to the existence or not of the right defined by the applicant. Instead, his aim is to choose the most appropriate and effective measure which secures the future applicant's entitlement or which temporarily settles the legal dispute between the parties without prejudging the final judgment. Interim relief creates and shapes a new legal situation which did not exist prior to the relevant application, and which is closely related to the duration of the decision ordering it¹⁷. For example, although there is a strong link between the action of annulment of an administrative measure and the application for the suspension of the operation of the same measure, the latter should not be considered as a weaker remedy than the former. An action of annulment deals with the legality, which has been disturbed by the illegal administrative measure. The suspension of the administrative act is ordered so as to avoid the

¹⁵ K.P.E. Lasok, *The European Court of Justice. Practice and Procedure*, London, Butterworths, 1994, p. 231

¹⁶ A.A.S.Zuckerman, *Interlocutory injunctions on the merits*, L.Q.R., 1991, p. 200

¹⁷ C. Beis, *The effectiveness of temporary judicial protection* (in Greek), Law and Economics, Sakkoulas, 1995, p. 140

creation of situations, which will later need to be overturned, if the court annuls the measure. The suspension of the administrative measure does not in principle depend upon the legality, or not, of the contested measure, but is ordered because the administrative measure is likely to be ruled illegal. In this way the court provisionally settles the situation until the final judgment on the action of annulment is given.

Therefore interim relief has an independent nature within the judicial system and should not be considered as having an ancillary character. As part of the general right to judicial protection, the right to ask for interim relief functions under special conditions. There are dilemmas that the authorities (legislative and judicial) need to confront in order to find the perfect balance: on the one hand the need for a prompt judgment and on the other hand, the correct award of justice. Furthermore, it is apparent that the judge, when granting interim measures, has to deal with a multitude of issues. These include: the balance of interests; the effective protection of either the defendant or plaintiff; the correct application of law; the creation of a new legal situation. This pluralism of issues highlights the fact that the judge has identified on the purpose of the interim relief and has taken action in dealing with this procedural right more independently. The initial nature of the temporary judicial protection, of an essentially ancillary character (which safeguards the right of the party asking for interim relief until a final judgment is made) has been complemented by a more autonomous yet parallel¹⁸ form of protection: the need for timeless award of justice.

It has been argued¹⁹ that interim relief as a way to deal with the problem of delay in justice and procedure can result in procedural inequality prejudicing the interests of the parties. Therefore it has been proposed that as long as interim relief has failed to deliver effective judgments an alternative way should be adopted; a non-interlocutory strategy. According to this strategy, the full procedure should be omitted and extensive processes should be limited. The proposal is to adopt the interim relief procedure in the full litigation procedure but the decision given should be final, rather than provisional. This plan seems to be effective and may finally produce an effective procedure, which will assist judicial authorities in giving correct judgments. The proposed plan protects the interests of the parties while enabling the judge to reach just results in a short period of time. However, it is obvious that this strategy is based on a simple assumption: the negative effect of interim relief. The view is held that in

¹⁸ Of course, an interim measure must still not prejudice the final decision

¹⁹ A.A.S. Zuckerman, *supra* n° 6, p. 377

civil procedure the interlocutory procedure may affect the interests of the parties permanently, making final judgment useless, and that a provisional decision affords unequal protection to the litigants.

It is submitted that the reason of the existence of the temporary judicial protection of rights is not just the creation of a mechanism which will confront the problem of delay and will provide the litigants with a provisional decision, which however is problematic regarding the low level of accuracy jeopardising the rights in question. It would be false to define the aim of a principle according to the result it has for a specific situation. Temporary judicial protection²⁰, the right to claim for a provisional protection of rights, is part of the basic human right to claim a right before the court, and demand a judgment to protect it. It is clear that the general right for effective protection includes the procedural right to ask for interim relief, or more specifically, the procedural right to ask the court to give a judgment, which will order the grant of interim measures²¹. A mere justification of this statement can be found in the legal system of the European Convention on Human Rights. Article 39 (1) of the Rules of Court allows the Court of Human Rights to indicate all interim measures that the State authorities should adopt in order for the protection of the individual to be effective in proceedings before it²². Furthermore a combined analysis of the case law on the reasonable time requirement under Article 6 (1) ECHR and of the case law on the right for an effective remedy before a national authority under Article 13 ECHR reinforces the conclusion that the effective protection of individuals requires interim relief²³. Finally the Committee of Ministers of the Council of Europe has developed a recommendation which provides a system of interim relief in administrative matters²⁴. Even if this document is not binding for the national authorities, it demonstrates the

²⁰ C. Beis, *supra* n° 17, p. 51; P. Dräi, *Pour un juge qui toujours décide*, G.P., 1987, chro., p. 512

²¹ N. Klamaris, *The right for judicial protection*, (in Greek), Sakkoulas, 1989, p. 160; R. Bernhardt, *Interim measures of Protection under the European Convention on Human Rights*, in *Interim Measures Indicated by International Courts*, edited by R. Bernhardt, Springer-Verlag, p. 103

²² Article 39 of the Rules of Court reads as follows: *1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measures which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.*

²³ *Klass and others v. Germany*, (1979-80) 2 EHRR 214, *Silver and others v. United Kingdom*, (1983) 5 EHRR 347; *Leander v. Sweden*, (1987) 9 EHRR 433, *W v. United Kingdom*, (1988) 10 EHRR, *Vilvarajah and others v. United Kingdom*, (1993) 14 EHRR 248, *Soering v. United Kingdom*, (1989) 11 EHRR 439; For an analysis of Article 13 ECHR see P. Mertens, *le droit de recours effectif devant les instances nationales en cas de violation d'un droit de l'homme*, Editions de l'Université de Bruxelles, 1973

²⁴ Recommendation R (89) 8 of the Committee of Ministers to Member States on provisional court protection in administrative matters, <http://cm.coe.int/ta/rec/1989/89r8.htm>

willingness of the Council of Europe to guarantee individuals, where necessary, provisional protection by the courts²⁵.

It is true that the existence of temporary judicial protection is due to procedural and organisational reasons concerning the effective protection of rights. On the one hand, as mentioned above, the delay of a final judgment has forced the judicial authorities to introduce such a remedy. On the other hand, there are cases which, in order for the court to cope with specific needs and dangers, need to be determined in a more precipitous fashion than might be normal. Furthermore, the introduction of temporary judicial protection to the judicial systems creates the so-called “two speed” judicial protection, or, “double” judicial protection. The mere existence of the interim relief can be justified by reference to the sole aim of the judicial system: to guarantee the award of justice. For the same reason, the temporary judicial protection is a prior step or, rather, (and importantly) a prior security, for this future guarantee.

I.2) Interim relief under European Law- Articles 242 and 243 EC Treaty

Having illustrated the nature and significance of interim judicial protection, it is essential to see how this protection is applied in the European legal order. European Community law and, more precisely, the judicial review of Community Law, is made up of the rules of administrative law. Thus the Community can be described as a legal order based on administrative rules²⁶. Administrative law is the law which controls governmental power in order to protect individual rights, to ensure the effectiveness of the administration and to foster the participation of interested parties in the decision-making process²⁷. Applying this definition to the European legal order, it is evident that the structure and scope of the European Union is primarily focused on such administrative rules. This is due to the fact that European Law itself draws its inspirations from the legal systems of the several Member States, even if one still admits that the European Union is a *sui generis* system, different from a state or an international organisation²⁸. Furthermore, the judicial review of Community acts is

²⁵ E.A. Garcia, *Is Europe Ready for the Administrative Law Remedial Revolution?-Litigation before National Courts of the EEC Member States and Interim Relief*, *Administrative Law Review*, Vol. 42, 1990, p. 210

²⁶ Schwarze, *European Administrative Law*, Sweet and Maxwell, 1994, p.4

²⁷ P.Graig, *Administrative Law*, Sweet and Maxwell, 4th edition, London, 1992, p. 3

²⁸ There is an extended literature on the European constitutional system. It is important to mention at this point that the formation of powers of the Community Institutions present a clear example of the

organised in a way that reminds us of national legal orders. More specifically, as Simon demonstrates, the competence of the European Court of Justice and the Court of First Instance (as provided from the Treaties and the Rules of Procedure) to review all administrative acts adopted by the Community institutions show a mimetism of the judicial review in French administrative law²⁹. As this competence has been evaluated it is apparent, through the provisions in the Treaties, that a full system of judicial review is capable of controlling the legitimacy of the acts and the responsibility that Community Institutions and Member States have in order to preserve the Community interest. This similarity enables the comparison and co-examination of the different legal orders in order to emphasise the significance that those remedies have for the effective protection of Community law³⁰. Nowadays it is accepted that there is a mutual dependence between the diverse legal systems of the Member States and that of the European Union, and that this recognition urges us to analyse the effectiveness and scope of the European judicial system in accordance with the civil and common law jurisdictions.

European Law provides proceedings for interim relief before the Court of Justice and the Court of First Instance through provisions in the Treaty and the Rules of Procedure³¹. The nature of this provisional protection arises primarily from the non-suspensory effect of the actions brought before the European Courts. This non-suspensory effect of the actions brought before the courts is a principle applicable to national administrative law too. In French administrative law, for example, there is the principle that there is no suspensory effect of any action before the administrative courts. It is established³² that the suspension of an administrative act comes as an exception, an extraordinary procedure to that principle. Administrative acts, the

unique model that the creators of the European Community have followed through the years in order to establish an economic and political Union in Europe. See D. Simon, *Le système juridique communautaire*, P.U.F., 2nd edition, 1998.

²⁹ D.Simon, *Le système juridique communautaire*, P.U.F., 2nd edition, 1998, p. 340 ; M.Berri, *The Special Procedures before the Court of Justice of the European Communities*, (1971) 8 CML Rev., p. 20 ; C. Delicostopoulos, *L'encadrement processuel des autorités de marché en droit français et communautaire*, L.G.D.J, 2002, p. 300

³⁰ For a comparative analysis of interim relief in different legal orders in the European Union and beyond see S. Flogaitis, *Mesures conservatoires et effet suspensif dans la procédure administrative*, in *General Reports-XIVth International Congress on Comparative Law, Athens 1994*, edited by K.Kerameus, Kluwer Law International, p. 735-746

³¹ Articles 242 and 243 EC Treaty, Articles Articles 83-90 Of the Rules of Procedure of the Court of Justice, Articles 104-110 of the Rules of Procedure of the Court of First Instance

³² B.Pacteau, *Contentieux administratif*, P.U.F., 4th edition, 1997, p. 271 ; R. Chapus, *Droit du contentieux administratif*, montchrestien, 4th edition, 1993 ; Y. Gaudemet, *Les procédures d'urgence dans les contentieux administratif*, R.F.D.A., 1988, p. 422

fundamental rules of public law, which express and promote public interest, can be neutralised and suspended only under specific conditions before the French courts³³. The non-suspensory effect of actions before the European courts and the fundamental principle that all administrative measures (therefore all Community measures too) are immediately enforceable and applicable justify the existence of interim relief as an essential safeguard of all rights of defence of individuals against the public-European power to adopt measures affecting them. Therefore the European legal system had to establish and guarantee a system of interim protection of individuals against the public interest³⁴. However the legal power of the European Institutions to enforce their measures directly conflicts with this right to request interim protection. Thus it is for the European legislative bodies to form the wider system of substantial and procedural conditions under which it will be decided whether the public-European interest can override the individual's interest for the adoption of interim measures.

Article 242(ex Article 185) EC Treaty provides that actions brought before the Court of Justice and the Court of first Instance do not have suspensory effect. When this prohibition is viewed beside the delay that may be incurred before the Court gives its judgment, it is obvious that the principle of effective judicial protection may be jeopardised³⁵. Therefore the Court in order to safeguard the effectiveness of the judgment can impose interim measures. In *Federal Republic of Germany v. Commission*³⁶ Germany requested the suspension of the operation of a Commission's Decision until final judgment has been given to the action of annulment of the contested decision. The president held that the unavailability of the suspension would be incompatible with the principle of Community law giving individuals the right to enjoy complete and effective judicial protection. This requires that interim protection be available to individuals if it is necessary for the full effectiveness of the definitive future decision. This order reflects the close link that interim measures have with the principle of effective judicial protection. More precisely, the president of the Court made reference to fundamental cases concerning the right for full effective

³³ The non suspensory effect was established early enough in Article 3 of the "decret" of 22 July 1806: "Le recours au Conseil d'Etat n'aura point d'effet suspensif s'il n'en est autrement ordonné".

³⁴ R. Chapus, *supra* n° 33, p. 801

³⁵ K. Lenaerts and D. Arts, *Procedural Law of the European Union*, Sweet and Maxwell, London, 1999, p. 287

³⁶ Case C-399/95 R *Federal Republic of Germany v. Commission*, [1996] ECR I-2441

protection³⁷ and underlined that interim measures are required “in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice”. Furthermore the significance of interim relief in the legal relationships between the public-European authorities and the individuals is such as to prove sometimes that the award of interim measures may be more important than the final judgment in the main action. The suspension of a Community measure or the adoption of other interim measures for a specific time period may prove more effective than the actual success in the main action. Therefore there might be situations where the applicant does not aim for definitive judicial protection of his rights in the main action but for the protection, even of provisional, from any direct enforcement of a Community measure.

According to the non-suspensory effect of actions brought before the European Courts Article 242 (ex Article 185) EC provides that “The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended”. It is of an ancillary nature and with regards to its duration, it can be considered provisional. The procedure of interim relief aims for the protection of the effectiveness of the final judgment and therefore it is teleologically related to the main action. When the Court orders the contested act to be suspended, it has in mind that this inapplicability of the administrative act will be for a specific time until final judgment is given on the main action³⁸. The importance of interim relief in the form of a suspension of the application of a community act is apparent if someone considers the relationship between the judicial system of the European Union and the scope that it has. The European Courts, when deciding whether to suspend a Community act, are mainly concerned, on the one hand, with the protection of the European legal system, by denying any suspension and, on the other hand, with the protection of the private interests of the opposite party (Member State or Individual). Interim relief, as provided in article 242 (ex article 185) EC Treaty, is an expression of the attitude of the European Court of Justice that the European interest is of primary importance, but that individuals can still be protected, even provisionally, if all necessary conditions are met.

³⁷ Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, Case 222/86 *UNECTEF v. Heylens*, [1987] ECR 4097

³⁸ Case 18/65R *Gutmann v. Commission*, [1966] ECR 135, Case 78/83 *Usinor v. Commission*, [1983] ECR 2183, Case 160/84R *Oryzomyli Kavallas v. Commission*, [1984] ECR 3217, Case 23/86R *United Kingdom v. Parliament*, [1986] ECR 1085, Case T-12/93R *CCE Vittel and CE Pierval v. Commission*, [1993] ECR II-449, Case T-554/93R *Abbott Trust v. Council and Commission*, [1994] ECR II-1

The judicial system of the European Union goes beyond the interim relief in the form of the suspension of the application of a Community act and provides the European Courts with the competence to grant all necessary interim measures in any case. Article 243 (ex Article 186) EC states that “The Court of Justice may in any cases before it prescribe any necessary interim measures”. The structure of interim relief before the European Courts follows the model adapted to the national jurisdictions of several Member States. According to the administrative law in the United Kingdom³⁹, where the court concludes that a decision of a public authority is subject to judicial review, after granting leave, the court can grant interim relief, pending the determination of the full application⁴⁰. Interlocutory injunctions (a term used in common law jurisdictions to define the interim relief protection) are available in judicial review proceedings under Order 53, r.3 (10)(b). Interlocutory injunctions are designed to preserve the status quo pending trial of the main action⁴¹. However whilst academics still argue that this is the aim of interim relief, the inaccurate nature of this conclusion has been suggested above⁴². Interim relief cannot preserve the status quo since any decision in those proceedings will change the legal situation already existing between the parties. According to the rules related to interim relief, the courts in judicial review proceedings can grant interim remedies as those are provided in the Civil Procedure Rules. These rules give jurisdiction to the courts to grant injunctions against all public bodies as well as against the Crown⁴³ and its servants⁴⁴. According to a judgment the court can “hold the ring” pending final judgment⁴⁵.

In France, apart from the suspension of the application of an administrative act, administrative law recognises the granting of interim measures before the French

³⁹ See J. Beatson, *Public and private rights in English administrative law*, L.Q.R., 1987, p. 34-65

⁴⁰ De Smith, Woolf, Jowell, *Principles of Judicial Review*, Sweet and Maxwell, London, 1999, p. 591

⁴¹ P. Craig, *Administrative Law*, 4th edition, Sweet and Maxwell, London, 1999, p. 745; A.A.S. Zuckerman, *Interlocutory injunctions on the merits*, L.Q.R., 1991, p. 196

⁴² See page 15

⁴³ *M v. Home Office* [1994] 1 A.C. 377

⁴⁴ D.Bean, *Injunctions*, 7th edition, FT Law and Tax, 1996, p. 59; J.Alder, *Public and Private Law Remedies Against the Crown and its Servants: The Question of Interim Relief*, Civil Justice Quarterly, 1986, vol.5, p. 230; J.Alder, *Interim Relief against the Crown*, M.L.R., 1987, p. 106; H.Wade, *Injunctive Relief against the Crown and Ministers*, L.Q.R., 1991, p. 9; M.Matthews, *Injunctions, Interim Relief and Proceedings against Crown Servants*, O.J.L.S., 1988, vol. 8, p. 158; J. Hanna, *Community Rights all at Sea*, (1990) LQR, p. 5

⁴⁵ *R. v. Secretary of State for the Home Department*, ex p. *Kirkwood*, *R. v. Cardiff City Council*, ex p. *Barry* [1990] C.O.D. 94, *R. v. Secretary of State for Education and Science*, ex p. *Avon C.C* [1991] 1 Q.B.558.

administrative courts⁴⁶. In particular, French administrative law has admitted the granting of interim measures since the act of 28 November 1955 (loi du 28 novembre 1955). Nowadays, according to article R. 102 and R.103 of the code for administrative tribunals (code des tribunaux administratives) in all cases of urgency the president of the administrative court can order all useful measures⁴⁷. Such rapid procedures are also recognised in a case brought before the Conseil d'État according to article 27 of the "decret" of 30 July 1963.

Through the presentation of the legal framework of interim relief in the different legal systems mentioned above, it is obvious that interim relief is part of the judicial review of administrative acts before a court, when there is a case concerning the validity of the contested act. At this point, without analysing the particular conditions, under which a court can grant interim relief, either through the form of a suspension or through positive interim measures, it is essential to explain the sole existence of such provisions in the diverse legal systems. The reason why interim relief is provided can be attributed to the length of the time that can pass before final judgment is given. It is evident that the efficacy of the judgments given on decisions taken from the administrative bodies (public bodies and authorities, government, as well as Community institutions representing the executive power) may lose their importance if they are time-consuming⁴⁸. Therefore the orders granting interim relief try to protect the interests of the parties pending a decision on the substance of the case, interests which could be endangered by the operation of the measure against which proceedings were initiated, thus swiping the final judgment of its efficacy⁴⁹. The scope of interim relief is to create a provisional situation for the parties at that stage of the case until final judgment is given. In other cases where a particular legal position

⁴⁶ G. Braibant, *Le droit administratif français*, Presses de la Fondation Nationale des Sciences Politiques et Dalloz, 3^{ème} édition, 1992, p. 523 ; B. Pacteau, *Contentieux administratif*, P.U.F., 4^{ème} édition, 1997, p. 294 ; R. Chapus, *Droit du contentieux administratif*, Montchrestien, 4^{ème} édition, 1993, p. 933 ; Y. Gaudemet, *Les procédures d'urgence dans le contentieux administratif*, R.F.D.A., 1988, p. 427.

⁴⁷ Code TA of 1973 (art. R.102): "dans tous les cas d'urgence, le président du tribunal... peut... ordonner toutes mesures utiles sans faire prejudice au principal et sans faire obstacle à l'exécution d'aucune décision administrative"

⁴⁸ G. Braibant, *Le droit administratif français*, Presses de la Fondation Nationale des Sciences Politiques et Dalloz, 3^{ème} édition, 1992, p. 522.

⁴⁹ G. Borhardt, *The Award of Interim Measures by the European Court of Justice*, (1985) 22 CML Rev., p. 206.

has already been altered, interim relief serves as a way to create a new *modus vivendi* between the parties⁵⁰.

A distinction should be made between the two different forms of interim relief provided in Article 242 and 243 (ex Articles 185 and 186) EC. The suspension of the application of Community act is a negative interim measure, as mentioned above, as it halts, for a determinate time, the effect that those acts have until final judgment is given. The European Court of Justice, in all cases where the validity of a Community act is alleged, has to confront the Community “administration” as a party in the proceedings. Each Community Institution that is a party to the case, represents the public interest- European interest and thus there is a strong degree of urgency to preserve such interest. At that stage the European Court of Justice can make use of the interim protection provided in Article 242 EC and examine whether a possible suspension of the contested measure can be effective for the parties and especially whether such order can serve the principle of just administration and equality of parties at the same time. The significance of the suspension of the application of a Community act is apparent through the correct use that the Court of Justice makes of it. Article 242 EC gives the European Court of Justice the opportunity to use their express power in a more intrusive way than the other institutions. Even if the interim relief is of a provisional, temporary nature, the Court can still neutralise the effect of a “valid” regulation or decision and therefore interfere with the administration of the European Union. However, as will be illustrated below, the conditions for such a suspension are strict. Going back to a national level it is established through case law and theory that French administrative law has treated the suspension of an administrative act in a stringent fashion⁵¹. This is apparent in the code of administrative tribunals where the suspension of an act is provided under the title “*titre exceptionnel*” (exceptional). French administrative law demonstrates the unwillingness of the administrative courts to consider the request of a suspension of an act as a straightforward claim. The Conseil d’Etat in a case in 1976⁵² pointed out that, even if the conditions of a suspension of an act are met, it is still for the judge to decide whether the act will be suspended or not. Suspension of such act negating the executory character of the administrative act is a principle which is expressed in

⁵⁰ B.Pastor et E. van Ginderachter, *La procédure en référé*, (1989) 25 R.T.D.E., p. 565

⁵¹ Y. Gaudemet, *supra* n° 47, p. 424

⁵² Case of 13 February 1976 *Association de sauvegarde du quartier notre-Dame* (Rev.dr.publ. 1976.903)

article 48 of the order 31 July 1945. This unwillingness to promote the suspension of an administrative act is justified by considering the role that the court has in protecting public bodies and ensuring the effective application of measures which encourage public power and interest.

The interim relief provided in Article 243 EC is of great importance in cases before the European Court of Justice. This importance derives from the fact that the Court can, instead of just suspending the application of a community act, still take other steps, positive measures to ensure that the situation and the protection of the interests will be effective until final judgment is given. In English law, an interim injunction can be mandatory or prohibitory in the sense that the court may not just restrain the implementation of a decision or a proposal which is potentially *ultra vires*⁵³, but also order an injunction to enforce public law duties⁵⁴. The application of positive interim measures starts when the exclusive negative protection of the suspension of the application of a Community act is not enough to avoid the irreparable damage of which a party is at risk through delay before the final judgment⁵⁵. The particularity of the positive interim measures is that the Court needs to pay attention as to what extent it can order the defendant Community institution to take any appropriate measures, even provisional, in order to safeguard the applicant's interests or even create a legal situation until the judgment on the main action is given. The borderline between the power of the Court to grant interim measures and its power to interfere in the decision-making process of the Community institutions is nebulous. The Court's power to take positive interim measures to preserve the situation of the parties does not extend to the taking of administrative decisions which are the responsibility of other Community institutions⁵⁶. This same approach, which highlights the significance and the nature of interim measures taken from a court towards an administrative body, is further apparent in French case law⁵⁷. The

⁵³ C.Lewis, *Judicial Remedies in Public Law*, 2nd edition, Sweet and Maxwell, London, 2000, p. 243

⁵⁴ *R. v. Kensington and Chelsea R.L.B.C., ex p. Hammell* [1989] 1 Q.B. 518

⁵⁵ E. van Girenderachter, *Référé*, in *Dictionnaire juridique des Communautés Européennes*, edited by A. Barav and C. Philip, P.U.F., p. 912

⁵⁶ Case 19/59 *R. Geitling Ruhrkohlen-Verkaufsgesellschaft mbH v. High Authority* [1960] ECR 34, Case 50/69 *R. Germany v. Commission* [1969] ECR 449, Case 23/74 *R. Kuster v. European Parliament* [1974] ECR 331, Case 71/74 *R. and RR Nederlandse Vereniging voor de Fruit- en Groentenimporthandel v. Commission* [1974] ECR 1031, Case 109/75 *R. National Carbonising Co Ltd v. Commission and National Coal Board* [1975] ECR 1193, Case 25/85 *R. Nuovo Campsider v. Commission* [1985] ECR 751

⁵⁷ Conseil d'Etat 13 février 1987, *Comité de sauvegarde du patrimoine de Montpellier*, Dr. admin. 1987, no 188.

introduction of positive interim measures in administrative law cases was a move towards the higher protection of private parties against the public power of the administration. However, as it has been pointed out, this primary scope of the interim measures, which exist in European Community law, has also been altered. Suffice to mention dicta from a French case before the Conseil d'Etat⁵⁸, where the paradoxical situation of the positive interim measures becoming an instrument of defence for the Administration is emphasised. In particular it was admitted that the relevant procedure had become an additional way for the Administration to secure the execution of administrative acts, a conclusion that had not been expected. Therefore, in light of the similarities of the national administrative law with the European judicial review system, it is obvious that the interim measures under Article 243 EC were intended to protect private parties against the defendant Community Institutions. Nevertheless, such intention may prove ineffectual if the Court continues to safeguard the interest of the Community institutions and the execution of the Community measures.

The case law of the European Courts is a crucial source for analysing the nature and significance of interim relief. In particular, in *Commission v. France*⁵⁹ Advocate General Capotorti made remarks on the nature of interim measures. In his opinion he stated that the interim measures which the European Court of Justice can grant under Article 186 (now 243) EC have a close link with the main action, are of a temporary nature and should never prejudice the main decision. After analysing the three factors AG Capotorti concluded that the application of interim measures was "to prevent the effectiveness of the decision to be jeopardised by a situation which is incompatible with the realisation of the rights of one party".

A more detailed analysis of the nature and significance of the interim relief protection of rights was given by Advocate General Tesauro in his opinion on *Factortame*⁶⁰. He went on to explain that a right already exists when there is an application for judicial review and that the procedure just postpones the effectiveness and the establishment of that right until a later point in time. Sometimes this comes too late and therefore the effectiveness and the utility of the judicial protection of the contested right are weakened. According to AG Tesauro "Interim protection has precisely this objective purpose, to ensure that the time needed to establish the existence of the right does not

⁵⁸ Conseil d'Etat 3 mars 1978, *Lecocq*, Rec.Cons.d'Et., p. 116

⁵⁹ Case 24 and 97/80 R *Commission v. France* [1980] ECR 1319

⁶⁰ Case C-213/89 R v. *Secretary of the State for Transport*, ex p. *Factortame Ltd* [1990] E.C.R. I-2433

in the end have the effect of irremediably depriving the right of substance, by eliminating any possibility of exercising it". Finally AG Tesauro made clear, as has been proved from several provisions in the European and national legal orders, that interim protection is a "fundamental and indispensable instrument" of any judicial system which aims to avoid the fact that the duration of a case before the court can nullify the effectiveness of the final judgment.

CHAPTER II**INTERIM RELIEF BEFORE THE EUROPEAN COURTS****II.1) Conditions for granting interim relief**

Articles 242 and 243 (ex Articles 185 and 186) EC in relation to the Rules of Procedure of the Court of Justice (Articles 83-90) and the Court of First Instance (Articles 104-110) regulate the conditions and the procedure required for the granting of interim measures before the European Courts¹. In particular Article 83(2) ECJ Rules of Procedure and Article 104(2) CFI Rules of Procedure provide the requirements and principles that must be applied when deciding whether to grant interim relief. First, the applicant must establish a *prima facie* case. Secondly, the applicant must demonstrate the necessity of the interim measures requested, as a matter of urgency in order to avoid serious and irreparable damage to his interests. Finally, the Court can balance the interests of the parties, which are at risk in deciding whether or not to order interim relief. The last requirement is not mentioned in the relevant provisions. However the European Courts have in certain cases balanced the prejudice which one party will suffer in a case where interim relief is granted or denied against the prejudice of the other party in the same situation².

II.1.A) *Prima facie* case

Articles 83(2) ECJ Rules of Procedure and Article 104(2) CFI Rules of Procedure provide that an application to suspend the operation of a measure or for the adoption of any other interim measure “shall state ... the pleas of fact and law establishing a *prima facie* case for the interim measures applied for”. The conditions of a *prima facie* case must be understood in different ways. An applicant for the adoption of interim measures has to establish a *prima facie* case both for the main action and for the application for interim relief³.

¹ See H. Schermers, *Judicial Protection in the European Communities*, Kluwer Publishers Deventer, the Netherlands, 1983, p. 475

² For a detailed analysis of the relevant cases see p. 45

³ Case 173/82R *Castille v. Commission* [1982] ECR 4047

In relation to the ancillary nature of the application for interim measures, the judge dealing with the application will examine whether the applicant has established a *prima facie* case in relation to the main action. This examination will have to deal both with the admissibility and the substance of the action. In *Donatab*⁴ the Court ruled that “According to 83(1)...an application to suspend is admissible only if the Court is seized of an action in which the applicant challenges the measure the operation of which it is sought to suspend. An application for suspension or for other interim measures cannot therefore be granted if the main application to which it relates is inadmissible”. In proceedings for interim relief the judge hearing the application has to make an accurate examination of whether the main action will be admissible. Such admissibility is crucial for the application of interim relief⁵. This requirement creates a dilemma⁶ for the judge hearing an application for interim relief: on the one hand the judge has to consider the admissibility of the application of interim relief by basing his decision on the admissibility of the main action. On the other hand, the provisional and ancillary nature of the application restricts him or her from prejudging the final judgment.

As a result of this dilemma the judge hearing the application of interim relief must closely consider whether to examine the admissibility of the main action. There are a series of orders⁷ showing the intention of the judge to avoid examining the admissibility of the main action. In *Pfizer*⁸ it was held that “the Court has repeatedly stressed that the issue of the admissibility of the main application should not, in principle, be examined in proceedings relating to an application for interim measures, but should be reserved for the examination of the main application so as not to prejudice that application. Consequently the question of admissibility raised by the Commission will not be examined in these interlocutory proceedings”. This cautious approach reflects the desire to separate the functions of the Court and the judge

⁴ Case C-64/93R *Donatab and Others v. Commission* [1993] ECR I-3955

⁵ Case C-68/90R *Blot and Front National v. European Parliament* [1990] ECR I-2177, Case C-117/91R *Bosman v. Commission* [1991] ECR I-3353, Case C-257/93R *Van Parijs and Others v. Council and Commission* [1993] ECR I-3917, Case 107/93R *AEFMA v. Commission* [1993] ECR I-4177.

⁶ K. Lenaerts and D. Arts, *Procedural Law of the European Union*, Sweet and Maxwell, London, 1999, p. 295

⁷ Case 25/62R *Plaumann and Co. v. Commission* [1963] ECR 126, Case 28/65R *Fonzi v. Commission* [1966] ECR 508, Case 75/72R *Perinciolo v. Council* [1972] ECR 1201, Case 186/80R *Suss v. Commission* [1980] ECR 3501, Case 23/86R *United Kingdom v. European Parliament* [1986] ECR 1085, Case 351/85R *Fabrique de Fer de Charleroi v. Commission* [1986] ECR 1307, Case 221/86R *Group of the European Right and National Front Party v. European Parliament* [1986] ECR 2969.

⁸ Case 65/87R *Pfizer v. Commission* [1987] ECR 1691

hearing the application for interim relief⁹. It is for the judge to decide on the admissibility and the substance of the application for interim relief. The general principle is that the admissibility of the main action should not be examined at the stage of an application for interim relief.

However, there have been cases where the judge has indeed dealt with the issue. In particular, in *CMC*¹⁰ the Commission claimed that the Court in the main action has no jurisdiction to entertain either the main action or the application for interim relief. The Court held that “since the preliminary objections...constitute a prerequisite for the decision on the admissibility of the application, the judge...cannot escape the necessity of resolving provisionally the various problems raised. It is sufficient, if he can establish, with a sufficient degree of probability, that there is a basis, on which the Court may found its jurisdiction in order to enable him to acknowledge the existence of a legitimate interest in the adoption of interim measures.” The evolution of case law¹¹ that has followed this order has created a stable principle that the judge hearing the application for interim relief will examine the admissibility of the main action if it is claimed from the other party that such action is manifestly, or at first sight, inadmissible. Therefore in such a situation the judge will try to establish that the main application reveals *prima facie* grounds for concluding that there is a certain probability that it is admissible and therefore there are sufficient findings to conclude that the application for interim relief is admissible too¹².

Moving on to an examination of the term “manifestly inadmissible”, there are cases which illustrate how the Court examines the admissibility of the main action and dismisses the application for interim relief where the main application is at first

⁹ K.P.E.Lasok, *The European Court of Justice. Practice and Procedure*, Butterworths, London, 1994, p. 255.

¹⁰ Case 118/83R *CMC v. Commission* [1983] ECR 2583

¹¹ Case 221/86R *Group of the European Right and national Front Party v. European Parliament* [1986] ECR 2969, Case 82/87R *Autexpo v. Commission* [1987] ECR 2131, Case 209/87R *EISA v. Commission* [1987] ECR 3453, Case 214/87R *Cockerill Sambre v. Commission* [1987] ECR 3463, Case 223/87R *Assider v. Commission* [1987] ECR 3473, Case 160/88 *Federation Européenne de la Santé Animale and Others v. Council* [1988] ECR 4121, Case 376/87R *Dstrivet v. Council* [1988] ECR 209, , Case C-117/91R *Bosman v. Commission* [1991] ECR I-3353, Case C-295/92 *Landbouwschap v. Commission* [1992] ECR I-5069, Joined Cases T-10-12/92R and T-14-15/92R *Cimenteries CBR SA and Others v. Commission* [1992] ECR II-1571, Case T-96/92R *CCE de la Société des Grandes Sources and Others v. Commission* [1992] ECR II-2579, Case T-310/97R *Government of the Netherlands Antilles v. Council* [1998] ECR II-455.

¹² Case 1/84R *Ilford v. Commission* [1984] ECR 423, Case T-96/92 *CCE de la Société des Grandes Sources and Others v. Commission* [1992] ECR II-2579, Case T-12/93R *CCE Vittel and CE Pierval v. Commission* [1993] ECR II-449, Case T-24/93R *CMBT v. Commission* [1993] ECR II-543

sight inadmissible. In *Bensider*¹³ the judge held that “the main action was clearly brought after the period prescribed by the ECSC Treaty has expired. In those circumstances, to order the suspension of the operation of a Commission decision would provide a means of circumventing the mandatory rules laid down by the Treaty for instituting proceedings for a declaration of nullity. The application must therefore be dismissed as far as those applicants are concerned.” Apart from the requirement of lodging an application within the time limit provided, the judge in *Farrall*¹⁴ dismissed the application for interim measures as the applicant has failed to comply with the formal requirement to be represented by a lawyer in the main action. Finally, there are orders where the judge dealt with the nature of the contested act challenged in the main action. In *Soktas*¹⁵ individuals have brought an action for the annulment of a decision initiating antidumping proceedings. The judge held that such a decision is at first sight a preliminary measure without legal effects, incapable of affecting the legal position of the undertakings and therefore the action of annulment and the application for suspension of the operation of the decision should be dismissed. In the same context the judge hearing an application for suspension of the operation of a decision contained in a letter from the Commission held that the letter merely constitutes an opinion, which is not binding on the national authorities and has no legal effects. Therefore the action of annulment of the contested decision was *prima facie* inadmissible¹⁶. Finally, in *Danielsson*¹⁷ the judge dismissed the application of the operation of the decision of the Commission and ruled that “...the applicants cannot be regarded as being *prima facie* individually concerned by the contested decision. It is thus apparent at first sight that the main action is manifestly inadmissible.”

The orders of the European Courts have tried to create a principle in relation to the examination of the admissibility of the main action. Accordingly the judge hearing the application for interim relief will not examine the admissibility of the main action, unless the main application is argued from a party to be manifestly inadmissible. In this situation the judge may examine the main action and decide with a certain degree of probability, without prejudging the final judgment, that the action is inadmissible. However the European Courts ruled that in cases where the admissibility of the main

¹³ Case 50/84R *Bensider v. Commission* [1984] ECR 2247

¹⁴ Case 10/81R *Farrall v. Commission* [1981] ECR 717

¹⁵ Case T-75/96R *Soktas v. Commission* [1996] ECR II-859

¹⁶ Case T-137/96R *Valio Oy v. Commission* [1996] ECR II-1327

¹⁷ Case T-219/95R *Danielsson and Others v. Commission* [1995] ECR II-3051

action is not manifest, or where the judge needs to examine the substance of the case the judge should have to proceed with the conditions of admissibility and substance of the application for interim relief without examining the main action. Although these restrictions imposed on the judge hearing the application for interim relief seem to be in conformity with the requirement that the interim measures should not prejudice the judgment in the main proceedings, it is submitted that this general rule should be further clarified. It should be accepted that the judge should in principle examine the admissibility¹⁸ of the main action without prejudging the final decision, rather than not doing so. This suggestion derives support from the nature of the application of interim relief, as well as from the relevant provisions.

In particular, Article 83(1) Rules of Procedure ECJ and Article 104(1) Rules of Procedure CFI illustrate the ancillary nature of the application for interim relief. Both articles state that “an application...shall be admissible only if the applicant is challenging that measure in proceedings before the Court”. On careful examination of the relevant provision, it is clear that it is for the judge hearing the application for interim relief to check, at the very least, whether the applicant has brought an action against the contested measure before the Court. The function of the judge will normally be to examine whether the formal requirements provided in the Treaty and the Rules of Procedure have been met in order to consider that an act has been challenged. In order to achieve that the judge might have to examine the active and passive legitimation, the time limits, the nature of the contested measure, the interest of the applicant. It would be fallacious to consider that Article 83(1) would not incorporate this function of the judge. As long as an action for the contested measure brought before the Court is considered to be one of the conditions of the admissibility of the application of interim relief, the prohibition not to examine these requirements of admissibility of the main action would mean that the condition was meaningless. In other words, it is difficult to understand how the judge hearing the application for interim relief would be able to ascertain that the contested act has been challenged in proceedings before the Court without examining whether certain requirements have been met.

The only ‘leeway’ the European Courts accepted was the cases where the action is argued to be manifestly inadmissible. Accordingly when a party claims that the

¹⁸ M.Slusny, *Les mesures provisoires dans la jurisprudence de la Cour de justice des Communautés Européennes*, Rev.Belge de Droit international (1967), p. 140

action is at first sight inadmissible, i.e. when the action is not lodged within the time limit, or when the applicant is not represented by a lawyer, the judge can safely rule (provisionally) on the inadmissibility of the main action and therefore the application of interim relief can be dismissed. It must be pointed out though that in certain cases the Court of First Instance did not hesitate to rule on the admissibility of an action of annulment even if this decision was based on the complex issue of individual and direct concern of the applicant¹⁹. It is argued that this is the correct approach. On account of its ancillary nature, an application for interim measures would gain an undesirable or even unacceptable degree of independence if the judge could grant interim relief in relation to an inadmissible main action. The requirement of a manifest inadmissibility has definitely provided assistance to the judge, but should not be used in a way that could alter the nature of interim relief proceedings, allowing the judge to proceed to the examination of the application of interim relief without checking whether the main action is admissible or not.

Consequently it must be accepted that the judge hearing the application for interim relief should have the power to examine *ex officio* the admissibility of the main action as required from Article 83(1) Rules of Procedure ECJ. This examination should be limited of course to a certain degree of probability that would not prejudice the final judgment of the main action. In each case the judge on its own initiative will have to identify whether the inadmissibility of the main action can be ruled provisionally, and it is the judge's task to consider whether such decision can affect or not the outcome of the final judgment. It is a matter of the judge to clarify whether the inadmissibility of the main action is manifest or not, even if the interested parties have put forward or not arguments against or for the manifest inadmissibility. It can be admitted from the relevant cases of the European Courts that it should always depend on the particular factors of law and fact of the main action whether there is a manifest inadmissibility instead of creating general rules, especially on issues such as the individual and direct concern of the applicant.

Apart from the examination of the admissibility of the main action, the judge is required to examine all factual and legal grounds of the main case. The task of examining the substance of the main application proves really delicate²⁰. The

¹⁹ Case T-219/95R *Danielsson and Others v. Commission* [1995] ECR II-3051

²⁰ G. Borchardt, *The award of interim measures by the European Court of Justice*, (1985) 22 CML Rev., p. 209.

summary procedure of interim relief and the prohibition not to prejudice the final judgment of the main case make it difficult for the parties to illustrate all available arguments in order to prove that the application for interim relief is sound. It is evident that these two factors mean that the applicant may have incomplete evidence at the proceedings of the application of interim relief. It is thus problematic for him to prove that the case is well-founded. The term “prima facie” in Article 83(2) Rules of Procedure ECJ illustrates the degree of examination that the Court can give to an application for interim relief²¹. The applicant does not need to present the same degree of certainty as is required for the final judgment.

Examination of the case law of the European Courts demonstrates the evolution of the requirement of the examination of the substance of the main case and the degree of probability demanded for the proof of the substantial basis of the action. The expressions used show that the Court takes different approaches as to how to deal with the substance of the main case. In several cases²² the judge held that there should be a *fumus boni iuris*, a strong presumption that the action is well founded or that it should at least be prima facie clearly well founded. In *Johnson and Firth Brown*²³ the judge hearing the application for interim relief considered it sufficient that the application was not manifestly without foundation. Following this order there has been a large number of cases confirming the view that the examination of the main action should not convince the judge of the success of the applicant, but just present such a possibility as probable²⁴. It is even more important to mention that in several

²¹ K.P.E.Lasok, *The European Court of Justice. Practice and Procedure*, Butterworths, London, 1994, p. 253.

²² Cases 43,44 and 48/59 *Von Lachmuller and Others v. Commission* [1960] ECR 489, Case 65/63 *Prakash v. Commission* [1965] ECR 576, Case 68/63R *Luhleich v. Euratom Commission* [1965] ECR 618, Case 50/69R *Germany v. Commission* [1969] ECR 449

²³ Case 3/75R *Johnson and Firth Brown v. Commission* [1975] ECR 1

²⁴ Case 61/77 *Commission v. Ireland* [1977] ECR 937, Case 792/79 *Camera Care Ltd v. Commission* [1980] ECR 119, Cases 24 and 97/80 *Commission v. France* [1980] ECR 1319, Case 232/81R *Agricola Commerciale Olio Srl v. Commission* [1981] ECR 2193, Case 42/82 *Commission v. France* [1982] ECR 841, Case 78/83R *Unisor v. Commission* [1983] ECR 2183, Case 114/83R *SICA and SIPEFEL v. Commission* [1983] ECR 2315, Case 120/83R *Raznoimport v. Commission* [1983] ECR 2573, Case 1/84R *Ilford v. Commission* [1984] ECR 423, Case 141/84R *De Compte v. European Parliament* [1984] ECR 2575, Case 160/84R *Oryzomili Kavallas OEE v. Commission* [1984] ECR 3217, Case 270/84R *Licata v. Economic and Social Committee* [1984] ECR 4119, Case 146/85R *Diezler v. Economic and Social Committee* [1985] ECR 1805, Case 154/85R *Commission v. Italy* [1985] ECR 1753, Case 250/85R *Brothers Industries Ltd v. Council* [1985] ECR 3459, Case 273/85R *Silver Seiko Ltd v. Council* [1985] ECR 3475, Case 297/85R *Towa Sankinden Corpn v. Council* [1985] ECR 3483, Cases 277 and 300/85R *Canon Inc v. Council* [1985] ECR 3491, Case 293/85R *Commission v. Belgium* [1985] ECR 3521, Case 351/85R *Fabrique de Fer de Charleroi v. Commission* [1986] ECR 1307, Case 360/85R *Dillinger Huttenwerke AG v. Commission* [1986] ECR 1319, Case 48/86R *Cauet and Joliet v. Commission* [1986] ECR 1237, Case 62/86R *AKZO Chemie BV*

orders the Court has not considered the condition of the *prima facie* case and proceeded directly to the examination of the requirement of urgency and the test for the balance of interests of the parties. Such approach has been accepted since it may prevent the judge from entering into an examination of the merits of the action, when finally the other conditions for interim relief are not met and the application can be dismissed on other grounds²⁵. Yet the relevant provisions providing for the conditions for an application for interim relief do not demand the examination of the relevant requirement to be made first. The general principle concerning the examination of the substance of the main action can be deduced from the case law. The judge must examine the arguments of the applicant and the pleas of the defendant concerning the merits of the action in order to make a proper use of the application of the interim relief. Yet this examination will not necessarily convince him or her of the success. The outcome of the main action is important for the Court hearing the action. It is for the Court to examine the case in depth so as to be able to make its evaluation. Yet the judge hearing the application for interim relief needs a lesser degree of certainty. He, or she, needs the degree of knowledge which will allow him or her to believe that the main case has a reasonable chance of success. Thus the *fumus boni iuris* requirement can be altered into *fumus non malis iuris*²⁶. The predictability that a case will succeed is stronger than the persuasion that there are serious doubts concerning the rights in the case. It is enough for a judge to proceed at the summary procedure of interim

v. *Commission* [1986] ECR 1503, Case 175/86R *RM v. Council* [1986] ECR 2511, Case 221/86R *Group of the European Right v. European Parliament* [1986] ECR 2969, Case 304/86R *Enital SpA v. Council and Commission* [1987] ECR 267, Case 90/87R *CW v. Court of Auditors* [1987] ECR 1801, Case 23/87R *Aldinger v. European Parliament* [1987] ECR 2841, Case 24/87R *Virgili v. European Parliament* [1987] ECR 2847, Case 76/88R *la Terza v. Court of Justice* [1988] ECR 1741, Case 92/88R *Associazione Industrie Siderurgiche italiane (ASSIDER) v. Commission* [1988] ECR 2425, Case 76/77 and 91/89R *Radio Telefis Eireann v. Commission* [1989] ECR 1141, Case 56/89R *Publishers Association v. Commission* [1989] ECR 1693, Case 246/89R *Commission v. United Kingdom* [1989] ECR 3125, Case C-195/90R *Commission v. Germany* [1990] ECR I-2715, Case C-345/90P-R *European Parliament v. Hanning* [1991] ECR I-231, Case T-23/90R *Automobiles Peugeot SA and Peugeot SA v. Commission* [1990] ECR II-195, Case T-39/90R *Samenwerkende Elektriciteits-produktiebedrijven NV v. Commission* [1990] ECR II- 629, Case T-45/90R *Speybrouck v. European Parliament* [1990] ECR II-705, Case C-272/91 *Commission v. Italy* [1991] ECR I-457, Case T-13/91 *Harrison v. Commission* [1991] ECR II-179, Case T-24 and 28/92 *Langnese-Iglo GmbH and Scholler Lebensmittel GmbH and Co KG v. Commission* [1992] ECR II-1839, Case C-280/93R *Germany v. Council* [1993] ECR I-3667, Case C-2906/93 *France v. Commission* [1993] ECR I-4181, Case C-307/93R *Ireland v. Commission* [1993] ECR I-4191, Case T-7/93 and T-9/93 *Langnese-Iglo GmbH v. Commission* [1993] ECR II-131, Case T-21/93 *Peixoto v. Commission* [1993] ECR II-463, Case C-149/95P (R) *Commission v. Atlantic Container Line and Others* [1995] ECR I-2165, Case T-65/98 *Van den Bergh Foods Ltd v. Commission* [1998] ECR II-2641,

²⁵ B.Pastor et E. Van Ginderachter, *La procedure en référé*, (1989) 25 R.T.D.E., p. 588

²⁶ K. Lenaerts and D.Arts, *Procedural Law of the European Union*, Sweet and Maxwell, London, 1999, p. 300

relief if there is a serious dispute, or if there is a doubt in relation to a right or the legality of a measure. Still it is essential to argue that the judge, usually acting on his own²⁷, without being accompanied by the Advocate-General will take a decision based on his or her own persuasion on the legal and factual issues brought before him/her. Therefore in relation to the provisional and exceptional nature of interim relief the judge needs to be convinced that at least there are serious questions which justify his decision to grant interim measures or suspend the operation of a measure. However this degree of certainty should be formed at a later stage, when examining the existence of urgency and of irreparable harm, where the judge is allowed to proceed with a more detailed analysis of the facts.

II.1.B) *Urgency*

The second requirement for the grant of interim relief is that the applicant needs to demonstrate the necessity of the interim measures requested, as a matter of urgency in order to avoid serious and irreparable damage. This condition justifies the exceptional nature of the proceedings provided in Articles 242 and 243 (ex Articles 185 and 186) EC. Although the word “urgency” is connected with the procedure for granting interim relief, such an expression is not contained in the Treaty provisions. However in the Rules of Procedure of the Court of Justice and the Court of First Instance it is clearly provided that the applicant “...shall state the circumstances giving rise to urgency...”²⁸. Urgency is considered to be the fundamental criterion of the admissibility of the application for interim relief²⁹. It is actually the justification of the mere existence of the exceptional procedure of Articles 242 and 243 EC Treaty, as there should be no reason for granting interim relief if the case does not show urgency³⁰. The proof of urgency is essential as it justifies the jurisdiction and the power of the judge to order a suspension of a measure or grant other interim measures according to the relevant provisions. Therefore, even if the main Treaty provisions

²⁷ Article 85(1) Rules of Procedure ECJ: *The President shall either decide on the application himself or refer it to the Court. If the President is absent or prevented from attending, Article 11 of these Rules shall apply.*

²⁸ Article 83(2) Rules of Procedure ECJ, Article 104(2) Rules of Procedure CFI.

²⁹ M. Slusny, *Les mesures provisoires dans la jurisprudence de la Cour de justice des Communautés Européennes*, *Revue belge de Droit international* (1967), p. 143

³⁰ B. Pastor et E. Van Ginderachter, *La procédure en référé*, (1989) 25 R.T.D.E., p. 597

make no reference to urgency as a condition of admissibility, it has been accepted that it forms the primary condition, which determines the nature and the exceptional character of the application for interim relief.

Urgency is related to the time-consuming procedure of the Court giving final judgment and to the delay that may affect the applicant's interests. However, urgency should not be determined by the time of an application for interim relief or by the time that the Court needs to give final judgment to an action. This condition must be subject to the applicant proving that it is necessary to obtain the relief requested before the final judgment in order to avoid possible damage. It has been well established that urgency is closely related to necessity and the damage that may occur before final judgment. In *Arbed v. Commission*³¹ the Court explained the meaning of urgency and stated that interim measures are urgent in the sense that they are necessary in order to avoid serious and irreparable damage, and should take effect before the judgment of the Court on the main action. In *Aldinger v. Commission*³² the judge held that "urgency is not determined by the speed with which a measure is to be applied for and taken but by the extent to which a person may need to obtain the adoption of a measure which is necessary at the present time to avoid certain damage." The applicant needs to furnish proof that he/she cannot wait for the final judgment of the main action without personally suffering serious and irreparable damage³³. The Court has stressed the close relation that urgency needs to have with the necessity to give an order granting interim relief³⁴. The basic rule therefore would be that urgency exists as long as the necessity for an order to grant interim relief justifies the prevention of certain damage. If the applicant cannot prove that there are circumstances of such an urgent nature then the application for interim relief will be rejected³⁵.

The Court therefore needs to be convinced that there is a certain degree of necessity in order to grant interim relief. In *Europemballage and Continental Can v.*

³¹ Case 20/81R *Arbed SA and Others v. Commission* [1981] ECR 721

³² Case 23/87R *Mareile Tziovas, née Aldinger, v. European Parliament* [1987] ECR 2841, Case 24/87 *Gabriella Schettini, néVirgili, v. European Parliament* [1987] ECR 2847

³³ Case 142/87R *Kingdom of Belgium v. Commission* [1987] ECR 2589

³⁴ Case 111/88R *Hellenic Republic v. Commission* [1988] ECR 2591, Case 246/89R *Commission v. United Kingdom* [1989] ECR 3125, Case C-225/91R *Matra SA v. Commission* [1991] ECR I-5824, Case C-307/93R *Ireland v. Commission* [1993] ECR I-4192

³⁵ Case 2/65 *Ferriera Ernesto Preo e Figli v. High Authority* [1966] ECR 231

*Commission*³⁶ the Court held that the suspension sought appeared to be all the less necessary since there was nothing to indicate that it could not give judgment on the main action in good time and decide upon any appropriate measure. In several other cases the Court had to deal with the issue of the time of the application for interim relief. It was held that the necessity and the urgency for an order granting interim measures was not proved since the application was made eight months after the main action was brought before the Court³⁷. In his opinion in *Commission v. United Kingdom*³⁸ Advocate General Mayras pointed out that importance should be attached to the fact that the Commission waited two months after the lodging of the application for a declaration against the United Kingdom for failure to fulfil an obligation in order to put before the Court its application for the adoption of an interim measure. Such a delay cannot justify the degree of urgency needed for an adoption of all necessary interim measures under Article 186 EC Treaty (now Article 243 EC). The delay of the application for the adoption of interim measures may alter the legal situation as the contested measure has taken already effect. If a measure has already taken effect before the application for interim relief, it is impossible to hold that the matter is urgent³⁹. However in the same situation if there is no evidence that future damage will be avoided “a remedy is urgently called for”⁴⁰. In *Commission v. Germany*⁴¹ the Court pointed out that urgency refers to future events only and not to situations that have already occurred by the time the application was lodged.

An order for interim relief can be made if the applicant proves that there is a threat that the status quo will be threatened⁴². The nature and purpose of the application of interim relief justify the power of the judge to protect and maintain the status quo on a temporary basis until final judgment is given. In principle, for the purpose of interim relief, the status quo should be considered to be the situation existing at the time the application for granting interim relief is lodged before the

³⁶ Case 6/72R *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1972] ECR 157

³⁷ Case 28/65 *Fonzi v. Commission* [1966] ECR 508

³⁸ Case 31/77R and 53/77R *Commission v. United Kingdom* [1977] ECR 921

³⁹ Case 61/76R II *Jean Jacques Charles Geist v. Commission* [1976] ECR 2075

⁴⁰ Case 42/82R *Commission v. French Republic* [1982] ECR 841

⁴¹ Case 57/89R *Commission v. Germany* [1989] ECR 2849; The Commission was requesting the Court to order the suspension of the construction work which has already been partially completed.

⁴² Case 160 and 61/73R *Miles Druce and Co Ltd v. Commission* [1973] ECR 1049, Case 318/81R *Commission v. CO.DE.MI. SpA* [1982] ECR 1325, Case 171/83R *Commission v. France* [1983] ECR 2621

Court⁴³. However, even if the judge granting interim relief is concerned with maintaining the situation existing at the time of the application, there are cases where the judge has had to take into consideration the status quo ante, at a point of time previous to the date of the application⁴⁴. In *Commission v. Italy*⁴⁵ the Court held that the interim measure was intended “to establish right away the situation which, according to the applicant, should be brought about by the judgment to be given by the Court in the present case”. The exceptional nature of interim relief and the temporary protection it provides for the applicant’s interests prove that one of the main functions of the Court is to protect parties’ rights and to establish a temporary legal arrangement, which will be conclusively settled at the final judgment. However, the judge needs to bear in mind that the interim measure adopted should not prejudice the main case. Where the applicant seeks the same relief as the one in the principle action, then the judge should dismiss the application as it could prejudice even temporarily, the final judgment⁴⁶. When the interim measure attempts to provide relief, the nature of which is likely to be repeated in the final judgment, the interim measure loses its temporary nature and the application for interim relief should be dismissed.

The Court has in several circumstances dismissed the application for interim relief as it has concluded that urgency and necessity of interim relief was not proved. In particular the Court prefers to dismiss the application in cases where there is a different way in order to avoid the serious and irreparable damage which may occur until final judgment is given. There is no urgency when the applicant in order to protect his/her interests can bring another action against the relevant Institution before the Court⁴⁷, or when the defendant can satisfy the applicant’s concerns⁴⁸ and avoid the damage by using an existing mechanism. Urgency is not proved, and there is no necessity to order any interim measures, when the defendant Institution gives an undertaking⁴⁹ that the contested measure will not be applied, or when the defendant

⁴³ K.E.P. Lasok, *The European Court of Justice. Practice and Procedure*, London, Butterworths, 1994, p. 264

⁴⁴ Case 154/85R *Commission v. Italy* [1985] ECR 1753

⁴⁵ Case 352/88R *Commission v. Italy* [1989] ECR 267

⁴⁶ Case 731/79R *B. v. European Parliament* [1979] ECR 3629, Case 794/79R *B. v. European Parliament* [1979] ECR 3635

⁴⁷ Case 186/80R *Benoit Suss v. Commission* [1980] ECR 3501

⁴⁸ Case 82 and 83/85R *Earasia Corporation Ltd v. Commission* [1985] ECR 1191, Case C-296/93R *French Republic v. Commission* [1993] ECR I-4181

⁴⁹ Case 68/63R *Luhleisch v. Euratom Commission* [1965] ECR 618, Case 31/79R *Société des Acieries de Montereau v. Commission* [1979] ECR 1077, Cases 161 and 162/80R *Carbognani and Zbetta v.*

reassures the Court that the final judgment will be fully effective, despite the fact that in the meantime the situation may have been altered⁵⁰.

Although the applicant needs to prove that it is urgent and necessary for the Court to order the suspension of a measure or to grant other necessary interim measures, such requirement will only be satisfied if the Court is convinced that serious and irreparable damage has to be avoided. There has to be a cause and effect relationship between the urgency of the situation and the damage that may occur if interim relief is not granted⁵¹. The facts presented in an application for interim relief must demonstrate that the occurrence of “serious and irreparable damage” to the applicant’s interests “urges” the Court to order all “necessary” interim measures.

II.1.C) *Serious and irreparable damage*

The proof of serious and irreparable damage is part of the second condition in order for an application for granting interim relief to be admissible and for the judge to order all necessary interim measures requested. Even if the relevant provisions in the Treaty and the Rules of Procedure of the European Courts make no reference to such damage, it has been established through the case-law, as mentioned above, that owing to its exceptional nature interim relief needs to be urgent in order for the applicant to avoid serious and irreparable damage that may occur till final judgment is given in the main action. Therefore urgency and necessity are proven as long as the nature of the damage has been put forward before the Court. The urgent nature of the relief is determined by the mere nature of the damage, which finally constitutes the yardstick for an application for interim measures to be accepted⁵².

It must be pointed out that, in principle, only the damage affecting the applicant can be considered as relevant for an application for interim relief. In *Fabbro v.*

Commission [1980] ECR 2655, Case 163/80R *Rosina Jacobucci v. Commission* [1980] ECR 2661, Case 45/84R *EISA v. Commission* [1984] ECR 1759, Case 260/85R *Tokyo Electric Co Ltd v. Council* [1985] ECR 3467, Case 78/86R *Costacurta v. Commission* [1986] ECR 1231, Case C-385/89R *Hellenic Republic v. Commission* [1990] ECR I-561, Case C-40/92R *Commission v. United Kingdom* [1992] ECR I-3389

⁵⁰ Case 89/82R *Wölker v. Commission* [1982] ECR 1323, Case 241/84R *Pizzinato v. Commission* [1984] ECR 3619, Case 64/86R *Sergio v. Commission* [1986] ECR 1081

⁵¹ Case T-44/90 *La Cinq SA v. Commission* [1992] ECR II-1

⁵² K. Lenaerts and D. Arts, *Procedural Law of the European Union*, Sweet and Maxwell, London, 1999, p. 301

*Commission*⁵³ it was held that the right to seek suspension of the operation of the contested measure is granted to applicants for the purpose of protecting their own interests. Interim measures cannot have any other object than to safeguard the interests of one of the parties to the proceedings⁵⁴.

When a Member State is a party in proceedings of interim relief the situation is different. The case law has not been consistent with the nature of the damage relied on. A number of cases have shown that the damage may occur to a person within the frontiers of the Member State⁵⁵. In some other cases Member States could not rely on the damage, which would not affect them directly⁵⁶. In *Germany v. Council*⁵⁷ the Court held that a Member State as a guardian of general interests at a national level, can act in order to avoid any damage affecting any economic or social sector in its territory. In *UK v. Commission*⁵⁸ it was held that “by virtue of its position as a Member State of the Community, which involves both participation in the exercise of legislative and budgetary powers and contribution to the Community budget, the United Kingdom cannot be denied the right to rely on the damage which would arise from the expenditure being incurred contrary to the rules governing the powers of the Community and its institutions”. The main issue arising in a case where a Member State is a party in an application for interim relief is whether the private interests or persons affected by the damage could on their own be protected by a separate action before the Court. In such circumstances where there are two possible actions to be taken before the European Courts, a Member State should not rely on the damage affecting a person who could adequately protect his/her interests by bringing proceedings other than those brought by the Member State⁵⁹.

⁵³ Case 269/84R *Corrado Fabbro and Others v. Commission* [1984] ECR 4333, Case 292/84R *Scharf v. Commission* [1984] ECR 4349, Case 55/86R *Asociacion Provincial de Armadores de Bugues de Pesca de Gran Sol de Pontevedra v. Council* [1986] ECR 1331, Case 111/88R *Hellenic Republic v. Commission* [1988] ECR 2591, Case 112/88R *Crete Citron Producers Association v. Commission* [1988] ECR 2597

⁵⁴ Case C-313/90R *Comité International de la Rayonne et des Fibres Synthétiques and Others v. Commission* [1991] ECR I-2557

⁵⁵ Case 166/78R *Italy v. Council* [1978] ECR 1745, Case 57/86R *Hellenic Republic v. Commission* [1986] ECR 1497, Case C-296/93R *French Republic v. Commission* [1993] ECR I-4181, Case C-307/93R *Ireland v. Commission* [1993] ECR I-4191

⁵⁶ Case 142/87R *Belgium v. Commission* [1987] ECR 2589, Case 111/88R *Greece v. Commission* [1988] ECR 2591, Case 303/88R *Italy v. Commission* [1989] ECR 801, Case 32/89R *Hellenic Republic v. Commission* [1989] ECR 985, Case C-356/90R *Belgium v. Commission* [1991] ECR I-2423

⁵⁷ Case C-280/93R *Germany v. Council* [1993] ECR I-3667

⁵⁸ Joined Cases C-239 and C-240/96R *United Kingdom v. Commission* [1996] ECR I-4475

⁵⁹ Case 111/88R *Hellenic Republic v. Commission* [1988] ECR 2591; Case 112/88R *Crete Citron Producers Association v. Commission* [1988] ECR 2597; Both the Member State and the private party

Finally, in connection to an action where a Community institution is requesting interim measures against an undertaking or a Member State, the Community institution needs to furnish proof of the damage that may affect its own interests⁶⁰. However as guardian⁶¹ of Community law the Commission can prove any damage affecting the interests of the Community⁶² or even the persons of a Member State, or the interests of another Member State⁶³. As it has been argued, it is not clear to what extent there are limits to the interests that a Community institution may rely on⁶⁴. In connection to the Commission, Article 211 (ex Article 155 EC) illustrates the central role of the institution in all aspects of the Community's life. It is undeniable that the Commission remains a powerful force for the achievement of the Community objectives⁶⁵. Therefore its interests could cover the wider Community interests including the safeguard of the interests of the Member States and those of their nationals. In *Commission v. Greece*⁶⁶ the ECJ confirmed that the task entrusted to the Commission is intended to safeguard the interests of the Community. In these proceedings on an application for the adoption of interim measures the Commission, with regard to Articles 224 and 225 EC Treaty (now Articles 297 and 298)⁶⁷, tried to

lodged separate applications for the suspension of the Commission Decision 88/438/EEC. The Court in Case 111/88R rejected the argument put forward by Greece that the producers would suffer damage and held that the damage should affect the applicant personally, issue which could not be proved by the submissions of the Member State.

⁶⁰ Case C-345/90P-R *European Parliament v. Hanning* [1991] ECR I-231

⁶¹ Case 45/87R *Commission v. France* [1987] ECR 1369

⁶² Case 61/77R *Commission v. Ireland* [1977] ECR 1411, Case 42/82R *Commission v. France* [1982] ECR 841; In his opinion AG Slynn states that in the present case the Commission has shown serious and irreparable damage and as there is more than an interference with the free movement of goods. Case 171/83R *Commission v. France* [1983] ECR 2621

⁶³ Case 293/85R *Commission v. Belgium* [1985] ECR 3521, Case 154/85R *Commission v. Italy* [1985] ECR 1753

⁶⁴ K.P.E. Lasok, *The European Court of Justice. Practice and Procedure*. London, Butterworths, 1994, p. 269

⁶⁵ P. Craig and G. de Burca, *EU Law: Text, Cases and Materials*, Oxford University Press, 2003, p. 65

⁶⁶ Case C-120/94R *Commission v. Greece* [1994] ECR I-3037

⁶⁷ Article 297 states that 'Member States shall consult each other with the view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security' Article 298 states that 'If measures taken in the circumstances referred to in Articles 296 and 297 have the effect of distorting the conditions of competition in the common market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaty.'

By way of derogation from the procedure laid down in Articles 226 ad 227, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in Articles 296 and 297. the Court of Justice shall give its ruling in camera.'

rely on any harm to Community interests as well as on harm suffered by a non-Member country (FYROM) as a result of measures that Greece took under Article 224 EC Treaty. The Commission brought an action under Article 225(2) EC Treaty for a declaration that Greece had made improper use of the powers provided for in Article 224 EC Treaty in order to justify the measures it adopted prohibiting trade (embargo) of products coming from or destined for FYROM⁶⁸. In addition it applied under Article 243 EC Treaty for an order requiring the suspension of these measures, pending judgment in the main action. As a first point, the ECJ held that the arguments put forward by the Commission appeared, at first sight, to be sufficient and serious to establish a *prima facie* case in an application for interim relief. It considered though necessary to examine the serious and irreparable harm resulting from the application of the measures adopted by Greece, which were the issue of the main action. It held that the existence of harm was not established, since it was not possible to establish that Greece made an improper use of Article 224 EC Treaty, without a detailed examination of that matter and without prejudging the decision on the substance of the case⁶⁹. The complexity of the procedure under Article 225 EC Treaty and the difficult assessments that it encompasses have to be taken into account when dealing with an application for interim relief. Finally the ECJ held that the matter of urgency and harm must be considered in the light of the interests which Articles 224 and 225 seek to protect. In particular the Commission can intervene when measures taken under Article 224 EC Treaty have the effect of distorting competition within the common market. Consequently the harm suffered by the FYROM as a non Member country could not be taken into account in the proceedings for interim relief⁷⁰.

The threat of serious and irreparable damage needs to be imminent. The applicant has to show that the damage will arise in the future before final judgment is given for the main action. A potential threat that damage will occur is not enough⁷¹. The damage must be real. The applicant needs to show that the potential damage is in

⁶⁸ See C. Stefanou and H. Xanthaki, *Article 224 of the Treaty of Rome and the Repercussions of Case C-120/94*, Web JCLI [1995] 3. This article examines Article 224 EC Treaty and then proceeds to apply it on *Commission v. Greece*.

⁶⁹ Case C-120/94R *Commission v. Greece* [1994] ECR I-3037, para. 92-94

⁷⁰ Case C-120/94R *Commission v. Greece* [1994] ECR I-3037, para. 98-100

⁷¹ Case 142/87R *Belgium v. Commission* [1987] ECR 2589, Case 209/87R *Association des Acieries Europeennes Independantes v. Commission* [1987] ECR 3453, Case 214/87R *Belgium v. Commission* [1987] ECR 3463; Case 223/87R *Associazione Industrie Siderurgiche Italiane v. Commission* [1987] ECR 3473; Case C-296/93R *France v. Commission* [1993] ECR I-4181; Case T-19/91R *Vichy v. Commission* [1991] ECR II-265; Case T-24/93R *Compagnie Maritime Belge Transport NV v. Commission* [1993] ECR II-543

direct connection to the effects that the contested measure can have⁷². In *CCE Vittel and CE Pierval v. Commission*⁷³ the Court held that “even if the alleged damage appeared sufficiently certain, such damage could not be a direct result of the Commission decision”. Therefore in an application for the suspension of the operation of a measure the potential damage has to occur directly from the intended consequence of the contested measure. In *Fabbro v. Commission*⁷⁴ the applicants argued that the potential implementation of the contested measure could affect them as their chances of promotion and mobility within a specific category might lessen. The Court held that such damage could not occur as an actual and immediate consequence of the contested measure and that it could not become apparent until further measures were adopted in implementation of that measure.

The damage caused to the person seeking interim relief needs to be serious and irreparable. However there has been no consistent approach on how to define these two terms⁷⁵. In *Commission v. France*⁷⁶ Advocate General Capotorti stated that the applicant should be exposed to serious, in the sense of irreparable damage. He went on to define irreparable damage as the damage, which will make the final judgment pointless, so that in the absence of interim relief there would be no purpose in the final judgment. Taking into consideration the nature of interim relief as part of the system of effective judicial protection of the rights deriving from Community law, the nature of the harm should be defined in relation to the effectiveness of the procedure of interim relief. This means that the judge granting interim measures needs to check mainly whether interim relief will provide the applicant with a degree of protection in order to avoid any potential damage until final judgment is given. The applicant therefore needs to prove that his/her rights are substantially affected by the intended result of the contested measure in such a way that final judgment will not guarantee his/her effective legal protection. Therefore using the formula adopted in the majority of cases where the term serious and irreparable damage is not analysed, the judge

⁷² Case 112/88R *Crete Citron Producers' Association v. Commission* [1988] ECR 2597, Case T-96/92R *Comite Central d'Entreprise de la Societe Generale des Grandes Sources v. Commission* [1992] ECR II-2579, Case 280/93R *Germany v. Council* [1993] ECR I-3667

⁷³ Case T-12/93R *Comite Central D'entreprise de la Societe Anonyme Vittel and Comite d'Etablissement de Pierval v. Commission* [1993] ECR II-785

⁷⁴ Case 269/84R *Corrado Fabbro and Others v. Commission* [1984] ECR 4333

⁷⁵ C. Gray, *Interim Measures of Protection in the European Court*, (1979) 4 EL Rev., p. 88; B. Pastor et E. Van Ginderachter, *La procedure en référé*, (1989) 25 R.T.D.E., p. 602; K. Lenaerts and D. Arts, *Procedural Law of the European Union*, London Sweet and Maxwell, 1999, p. 301

⁷⁶ Case 24 and 97/80R *Commission v. France* [1980] ECR 1319

should firstly examine whether the rights of the applicant are seriously affected. In his own motion the judge can examine whether there is a potential damage to the Community legal order from the illegality of the contested measure and therefore grant interim relief until final judgment is given. Such a hypothetical case demonstrates that the main concern of the Court is the seriousness of the effects that the duration of a judgment can have and the urgency to temporarily protect the interests of the parties. Thus, there are cases showing that a Member State can be affected financially more easily than a person or private undertaking⁷⁷. If such issue is proven then the seriousness of the damage is apparent and then the judge needs to proceed to the matter of irreparability⁷⁸.

The test for irreparable damage is that it is almost impossible to protect the applicant if he/she wins the main action⁷⁹. In *Raznoimport v. Commission*⁸⁰ the Court held that “even if the applicant were to undertake provisionally to bear the costs of that security in order to be able to market its products during the period in which the provisional duty is in force, that disadvantage cannot constitute serious and irreparable damage such as would permit the suspension of a decision adopted”. The Court will not grant interim relief where it is within the applicant’s own power to ensure that such serious and irreparable damage will be avoided⁸¹.

Where the damage relied on is purely financial, the Court will not regard it as serious and irreparable when it could be fully recoverable⁸². However, there are cases where the financial damage has indeed been considered to be serious and irreparable⁸³. In *Cosmos Tank v. Commission*⁸⁴ the Court held that the financial loss could not be quantified and therefore could not be recoverable. When there is an action for annulment where the Court does not have unlimited jurisdiction, the

⁷⁷ Case 20/81R *Arbed v. Commission* [1981] ECR 721, Case 294/86R *Technointorg v. Commission* [1986] ECR 3979, Case 111/88R *Hellenic republic v. Commission* [1988] ECR 2591

⁷⁸ B. Pastor et E. Van Ginderachter, *La procedure en référé*, (1989) 25 R.T.D.E., p. 603

⁷⁹ Case 29/66R *Gutmann v. Euratom Commission* [1967] ECR 241

⁸⁰ Case 120/83R *V/O Raznoimport v. Commission* [1983] ECR 2573

⁸¹ Case T-19/91R *Vichy v. Commission* [1991] ECR II-265, Case C-149/95P-R *Commission v. Atlantic Container Line* [1995] ECR I-2163

⁸² Case 120/83R *V/O Raznoimport v. Commission* [1983] ECR 2573, Case T-45/90R *Speybrouck v. European Parliament* [1990] ECR II-705, Case T-51/91R *Hoyer v. Commission* [1991] ECR II-679, Case C-213/91R *Abertal v. Commission* [1991] ECR I-5109, Case T-115/92R *Hogan v. European Parliament* [1993] ECR II-339, Case T-168/95R *Eridania v. Council* [1995] ECR II-2817

⁸³ Case 310/85R *Deufil v. Commission* [1986] ECR 537, Case 152/88R *Sofrimport v. Commission* [1988] ECR 2931, Case C-257/90R *Italsolar v. Commission* [1990] ECR I-3841, Case C-195/90R *Commission v. Germany* [1990] ECR I-3351, Case T-88/94R *SCPA and EMC v. Commission* [1994] ECR II-401, Case T-203/95R *Connolly v. Commission* [1995] ECR II-2919

⁸⁴ Case C-51/90R and C-59/90R *Cosmos Tank and Others v. Commission* [1990] ECR II-2167, Case T-41/97R *Antillean Rice Mills v. Council* [1997] ECR II-447

damage can be considered serious and irreparable unless the annulment of the contested act can fully compensate the loss⁸⁵. However in an action of damages before the Court the financial loss can be fully recoverable by payments and interest. The point is that if the financial loss is not fully recoverable the Court needs to ascertain whether the unrecoverable amount can cause serious and irreparable damage. It is obvious that there are always ways to recover pure financial damage, either through final judgment, or through other proceedings.

II.1.D) *Balance of Interests*

In the majority of cases brought before the European Courts, the decision for interim relief was given on the basis that the applicant has proved the threat of serious and irreparable damage to his/her interests and therefore it was urgent and necessary to grant interim relief to avoid such consequence. However there have been a number of cases showing that the judge is not solely satisfied with evidence put forward by the applicant in relation to the conditions required by the relevant provisions. Thus in some cases the Court has balanced the damage that might be caused to the interests of the applicant, against the damage that may occur to the defendant⁸⁶ or third parties⁸⁷ if

⁸⁵ K.P.E. Lasok, *The European Court of Justice. Practice and Procedure*, London, Butterworths, 1994, p. 280

⁸⁶ Case 15/63R *Lassalle v. European Parliament* [1964] ECR 57, Case 18/65R *Gutmann v. Commission* [1966] ECR 135, Case 22/75R *Berthold Küster v. European Parliament* [1975] ECR 277, Case 174/80R *Frans Reichardt v. Commission* [1980] ECR 2665, Case 20/81R *Arbed SA and Others v. Commission* [1981] ECR 721, Case 42/82R *Commission v. France* [1982] ECR 841, Case 347/82R *Alvarez v. European Parliament* [1983] ECR 65, Case 78/83R *USINOR v. Commission* [1983] ECR 2183, Case 270/84R *Licata v. Economic and Social Committee* [1984] ECR 4119, Case 278/84R *Germany v. Commission* [1984] ECR 4341, Case 293/85R *Commission v. Belgium* [1985] ECR 3521, Case 97/85R *Union Deutsche Lebensmittelwerke GmbH v. Commission* [1985] ECR 1331, Case 45/87R *Commission v. Ireland* [1987] ECR 1369, Case 23/87R *Aldinger v. European Parliament* [1987] ECR 2841, Case 176/88R *Hanning v. European Parliament* [1988] ECR 3915, Case 194/88R *Commission v. Italy* [1988] ECR 4547, Case 246/89R *Commission v. United Kingdom* [1989] ECR 3125, Case T-45/90R *Speybrouck v. European Parliament* [1990] ECR II-705, Case C-358/90R *Compagnia Italiana Alcool v. Commission* [1990] ECR I-4887, Case C-272/91R *Commission v. Italy* [1991] ECR I-457, Joined Cases T-24/92 and T-28/92R *Langnese-Iglo and Shöller lebensmittel v. Commission* [1992] ECR II-1839, Case T-29/92R *SPO v. Commission* [1992] ECR II-2161, Case T-146/95R *Bernardi v. European Parliament* [1995] ECR II-2255, Case T-84/96R *Cipeke v. Commission* [1996] ECR II-1313, Case T-155/96R *Mainz v. Commission* [1996] ECR II-1655, Case C-180/96R *United Kingdom v. Commission* [1996] ECR I-3903

⁸⁷ Case 6 and 7/73R *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp v. Commission* [1973] ECR 357, Case 3/75R *Johnson and Firth Brown v. Commission* [1975] ECR 1, Case 91/76R *De lacroix v. European Court of Justice* [1976] ECR 1563, Case 92/78R *Simmenthal v. Commission* [1978] ECR 1129, Case 142/82R *Copine v. Commission* [1982] ECR 1911, Case 228 and 229/82R *Ford Werke AG and Ford of Europe Inc v. Commission* [1982] ECR 3091, Case 173/82R *Castille v. Commission* [1982] ECR 4047, Case 114/83R *SICA and SIPEFEL v. Commission* [1983] ECR 2315, Case 67, 68 and 70/85R *Kwekerij Gebroeders van der Kooy BV v. Commission* [1985]

finally interim relief is granted. The Court proceeds to a test of balancing the interests (balance of convenience) of the parties or third parties in the context of the grant or refusal of interim relief⁸⁸. This condition is not mentioned in the Rules of Procedure of the ECJ or the CFI, but it is settled law that it derives from the principle of proportionality and seems to be used by the Court as an extra criterion for giving a decision to an application for granting interim relief. As it has been argued, the balancing test has more of a supportive, than an independent, character in relation to the condition of *prima facie* and urgency⁸⁹ and therefore it should not be considered as a condition of the award of interim measures in general.

When dealing with the balance of interests it is essential to make a distinction between the different purposes of such a test. There are two distinctive approaches to be examined. On the one hand, as mentioned above the balance of interests is not a condition for the award of interim relief. This opinion is based on the fact that, following the relevant provisions of the Rules of Procedure, nothing indicates that the judge has to take in consideration the harm that may occur to the defendant or third party in order to reach the decision of granting or refusing interim relief. On the other hand, the balance of interests, as an expression of the principle of proportionality, must be examined in order for the judge to decide on the form of the appropriate interim measure to avoid any damage to both parties and any third party.

In an application for interim relief the applicant needs to establish the threat of serious and irreparable damage and, as long as this requirement is satisfied, the judge can reach a decision on the application. The defendant has no obligation to put

ECR 1315, Case 57/86R *Hellenic Republic v. Commission* [1986] ECR 1497, Case 221/86R *Group of the European Right and National Front Party v. European Parliament* [1986] ECR 2969, Case 161/87R *Muyers and Tulp v. Court of Auditors* [1987] ECR 2381, Case 63/88R *Maindiaux v. Economic and Social Committee* [1988] ECR 1659, Case 56/89R *Publishers Association v. Commission* [1989] ECR 1693, Case C-345/90P-R *European Parliament v. Hanning* [1991] ECR I-231, Case T-96/92R *Comité Central D'Entreprise de la Société Générale des Grandes Sources v. Commission* [1992] ECR II-2579, Case T-12/93R *Comité Central D'Entreprise de la Société Anonyme Vittel v. Commission* [1993] ECR II-449

⁸⁸ C. Gray, *Interim Measures of Protection in the European Court*, (1979) 4 EL Rev., p. 91; G. Borchardt, *The award of Interim measures by the European Court of Justice*, (1985) 22 CML Rev., p. 221; K.P.E.Lasok, *The European Court of Justice. Practice and Procedure*, London, Butterworths, 1994, p. 281; M. Brealey and M. Hoskins, *Remedies in EC Law*, Sweet and Maxwell, 2nd Edition, p. 380; J. Usher, *European Court Practice*, Sweet and Maxwell, 1983, p.285; G. Vandersanden and A. Barav, *Contentieux communautaire*, Bruxelles, Bruylant, 1977, p. 444; B. Pastor and E. Van Ginderachter, *La procédure en référé*, (1989) 25 R.T.D.E., p. 610; M. Slusny, *les mesures provisoires dans la jurisprudence de la Cour de justice des Communautés européennes*, Rev.Belge de Droit Int (1967), p. 145

⁸⁹ G.Borchardt, *The Award of Interim Measures by the European Court of Justice*, (1985) 22 CML Rev., p. 221

forward evidence in relation to the harm that the grant of interim relief will create to his/her interests. This particular lack of obligation is essential in an application for the suspension of a Community measure. The Community institution as a defendant is not obliged to show that there is a public interest obstacle to the potential suspension. Although the Community public interest is safeguarded by the Community Institutions, it still constitutes a legal term that the European Court of Justice needs to examine on its own motion. Therefore, in principle, the judge will be able to reach a decision even if the opposing party has not shown any evidence for irreparable and serious harm, but he/she will still need to examine the harm to the Community public interest *ex officio* if interim relief is to be granted. However, in his/her pleas the defendant can demonstrate that if interim relief is granted, serious and irreparable damage will occur to him/her. The judge's approach in circumstances where both parties have demonstrated the threat of serious and irreparable damage should be based on the examination of the nature and the extent of damage⁹⁰. In *Langnese-Iglo v. Commission*⁹¹ the Court had to weigh the interests of the parties and finally held that "it is necessary in this case to seek a temporary solution, which ensures that the market does not develop in an irreversible manner whilst at the same time safeguarding the Commission's interest in bringing to an end forthwith the infringements of the Treaty competition rules, which it has ascertained and the essential interests of the parties to the dispute, until such time as the Court of First Instance is able to give a definitive decision in the present cases." Therefore, in such situations, it is for the judge to balance the risks of all parties and, instead of refusing or granting the interim relief as such, to try and find a solution which will temporarily minimise the risk of serious damage to any of the parties involved.

However there are many cases showing the intention of the judge to grant or refuse interim relief after employing the balance of interests approach. In *Commission v. Ireland*⁹² the Court was convinced that all conditions required for an application of interim relief were satisfied. However the judge considered it necessary to weigh each interest and finally held that the possible aggravation of the existing health and safety hazards, if the public works contract at issue was delayed, outweighed the Commission's interest, as a guardian of the Community interests. In staff cases the

⁹⁰ K.P.E.Lasok, *The European Court of Justice. Practice and Procedure*, London, Butterworths, 1994, p. 283

⁹¹ Case T-24/92R and T-28/92R *Langnese-Iglo v. Commission* [1992] ECR II-1839

⁹² Case 45/87R *Commission v. Ireland* [1987] ECR 1369

judge has consistently stressed the importance of balancing the interests of the individual with the interests of the relevant Community institution⁹³. However, in most of the cases the judge reached a decision and dismissed the application because the conditions of a *prima facie* case and urgency had not been satisfied. Yet in all its decisions the Court makes reference to the balance of interests test without though making clear whether it could be a sole criterion in order to grant or refuse interim relief.

The situation is clearer when the judge is deciding the form of interim relief that will be ordered. The judge uses the test in order to grant all appropriate interim measures in order to protect the parties' rights. At this point the principle of proportionality applies: a measure must be appropriate and necessary to achieve its objectives. According to the standard formula, the Court has to establish whether the means need to achieve the aim correspond to the importance of the aim, and whether they are necessary for its achievement⁹⁴. Article 243 (ex article 186) EC provides that all "necessary" measures should be adopted in order to avoid any serious and irreparable damage. This expression indicates that the principle of proportionality is applicable to the question of interim relief, where the Court has to apply the double test of suitability and necessity. Thus the judge has to balance the interests of the parties and as long he/she decides that the interim measure is suitable to minimise the risk and to safeguard the interests at stake, he/she needs to proceed to the necessity test, namely whether there are no less restrictive measures capable of producing the desirable result. In *Reichardt v. Commission*⁹⁵ the judge had to consider whether the serious and irreparable damage of the applicant would be disproportionate to the Commission's interest. In any event, the interim measures sought must not, despite their provisional nature, be out of proportion to the defendant institution's interest in having its acts implemented, even where an action has been brought against those

⁹³ Case 18/65R *Gutmann v. Commission* [1966] ECR 134, Case 22/75R *Berthold Küster v. European Parliament* [1975] ECR 277, Case 91/76R *Joelle de Lacroix v. Court of Justice* [1976] ECR 1563, Case 19/78R *Xavier Authié v. Commission* [1978] ECR 679, Case 174/80R *Frans Reichardt v. Commission* [1980] ECR 2665, Case 142/82R *William Copine v. Commission* [1982] ECR 1911, Case 173/82R *Gilbert Castille v. Commission* [1982] ECR 4047, Case 270/84R *Assunta Licata v. Economic and Social Committee* [1984] ECR 4119, Case 23/87R *Aldinger v. European Parliament* [1987] ECR 2841, Case 161/87R *Gert Myusers and Walter Tulp v. Court of Auditors* [1987] ECR 2381, Case 63/88R *Claude Maindix and Others* [1988] ECR 1659, Case 176/88R *Jack Hanning v. Commission* [1988] ECR 3915, Case T-146/95R *Giorgio Bernardi v. European Parliament* [1995] ECR II-2255

⁹⁴ T. Tridimas, *The General Principles of EC Law*, Oxford EC Law Library, Oxford University Press, 1999, p. 91

⁹⁵ Case 174/80R *Reichardt v. Commission* [1980] ECR 2665, Case 73/83R *UNISOR v. Commission* [1983] ECR 2183

acts⁹⁶. In *Langnese-Iglo and Schöller v. Commission*⁹⁷ the Court applied the necessity test and held that it was appropriate to prescribe only such interim measures, which were strictly necessary in order to limit the risk of serious and irreparable damage, which the applicants might suffer as a result of the immediate implementation of the contested decisions.

From the case law it is not easy to identify a specific approach that the Court uses in order to grant or refuse interim relief while balancing the interests of the parties. The problem in formulating a uniform interpretation of the European Court of Justice in the balance of interests test starts from the fact that the judge has the power, even if all conditions are met, to decide whether to grant or not interim relief. According to this power, which is not clearly provided in the relevant provisions, meeting the conditions of a *prima facie* case and of urgency as to avoid serious and irreparable harm, might seem insufficient to guarantee the grant of interim relief. In other words the judge can still refuse to grant interim relief even where the applicant has shown and established the conditions required by law. In such a case the judge makes use of an additional negative condition (the balance of interests) which is not mentioned in the Rules of Procedure of the Court of Justice, but which still can result in the rejection of the application for interim relief.

Following this reasoning fundamental issues as to the right of the applicant for effective judicial protection arise. On the one hand the balance of interest test limits the right for effective and temporary judicial protection, as the applicant might in certain situations, be denied such right, even if he/she has fulfilled all conditions expressed in the provisions. From the point of view of the applicant, this test of interests of the parties can result in limiting, virtually to the point of complete ineffectiveness, his right for temporary judicial protection. In a hypothetical case, the applicant may prove that there is a *prima facie* case and that it is urgent to take all necessary interim measures in order to avoid irreparable and serious harm and still receive a judgment, which denies the grant of interim relief. Therefore the question which needs to be answered is whether the balance of interests is a limitation to the right for interim relief, which can still guarantee the applicant's effective protection.

⁹⁶ Case T-146/95R *Bernardi v. European Parliament* [1995] ECR II-2255

⁹⁷ Joined Cases T-7/93 and T-9/93R *Langnese-Iglo and Schöller v. Commission* [1993] ECR II-131, Case C-149/95P(R) *Commission v. Atlantic Container Line and Others* [1995] ECR I-2165

On the other hand, the balance of interests test, as an implied condition for the judge to grant interim relief, creates an additional burden for the applicant. As long as the expressed conditions for interim relief might not prove sufficient for his/her protection, the applicant will often need to show a higher level of harm and urgency in order to guarantee the grant for interim relief. However there is not any consistent system as to when additional proof is needed and on which legal basis such additional proof is justified. In staff cases⁹⁸ the Court of Justice has ruled that the applicant needs to fulfil an additional condition: apart from showing the irreparable and serious harm, he/she needs to prove that the interim relief requested does not hinder the interests of the particular Community institution. Furthermore, in antidumping cases, where the applicant seeks the suspension of the application of an antidumping duty, he/she must provide evidence, firstly, by showing the serious and irreparable damage suffered by the duty and secondly by showing that the grant of interim relief will not cause any appreciable harm to the Community industry⁹⁹.

It is therefore evident that the balance of interests test can create unequal situations for the effective protection of the applicant's rights. Even if the test is considered to be part of the conditions for granting interim relief, the lack of a provision expressing it, and the lack of a consistent approach from the European Court of Justice, indicate the need for an amendment in legislation in order to ensure a uniform protection of Community rights. The parameters of judicial discretion should be set out in the Rules of Procedure. The balance of interests test should be an expressed third condition, separate from the *prima facie* case and the irreparable and serious harm, in the relevant provisions. In this way, the Court could justify its power to reject an application of interim relief even if the other conditions are met and there is a legal basis for the limitation of the applicant's right for interim relief. In addition to this proposal the Council has included the balance of interests test as a condition for granting interim relief in its Directive 89/665¹⁰⁰. In particular, Article 2 par. 4 of the Council Directive states that Member States may provide that, when considering whether to order interim measures, the body responsible may take into account the

⁹⁸ See Case 63/88R *Maindiaux v. Economic and Social Committee* [1988] ECR 1693

⁹⁹ See Case 77/87R *Technointorg v. Council* [1987] ECR 1793

¹⁰⁰ Council Directive 89/665 on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ 1989 L395/33. See C. Geraris, *The provisional protection in public works, public supply and public services contracts (law 2522/97)* (in Greek), Sakkoulas, Athens-Komotini, p. 40; C. Remelis, *The application for interim measures before the Council of State* (in Greek), Sakkoulas, Athens-Thessaloniki, p. 276

probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures where their negative consequences could exceed their benefit. With the establishment of the balance of interests test as a condition for granting interim relief, the interests of third parties and in particular the Community interest can be used as an essential component for the temporary protection and not just as an obstacle for the grant of interim relief.

Clear articulation of this test will facilitate the European Court of Justice in giving a uniform interpretation of the significance of the Community public interest and in providing the precise conditions of the applicability of the test. The principle that the Community administrative measures should be executed and enforced directly is opposed to the nature of the suspension of those acts. Community interest is concentrated in safeguarding the uniform application of Community law and the direct application of its administrative measures. It is therefore obvious that in an application for interim relief Community interests will always be in conflict with the aim of interim relief. At this point the Court needs to pronounce criteria, which will enable it to balance the opposite interests in order to reach the most effective judgment.

First, the European Court of Justice needs to abandon the notion of irreparable and serious harm of the applicant as the only fundamental condition for granting interim relief. Although this condition can create temporary solutions for the applicant, it cannot provide a high degree of certainty for the Court, which needs to protect the uniform application of Community law. The judgment granting or refusing interim relief should depend upon the question as to which interest should be primarily protected in the particular case¹⁰¹. When the applicant's interest is proved to be more important, the judge should grant interim relief until final judgment on the validity of a Community measure is given. In contrast, if the Court rules that it should give priority to the Community interest or the third parties' interests, the application for interim relief should be dismissed. Therefore the irreparable and serious harm is still fundamental for the grant of interim relief, but does not constitute the only substantial condition for the success of the relevant application.

¹⁰¹ V. Skouris, *The judicial suspension of the enforcement of administrative measures* (in Greek), 3rd edition, Sakkoulas, Athens, 1994, p. 198

Secondly, in an application for interim relief, the Court of Justice should abandon the belief of the *a priori* superiority of the Community public interest¹⁰². The Community interest shown from a particular Community Institution has to be specific and in close relation to the consequences that the grant or refusal of interim relief can create. A simple illustration of the wider Community interests and objectives should never be considered enough for the European Court of Justice to give judgment in favour of the Community. In addition to the balance of interests the Court needs to rule based on the principle that interim relief is more of a mechanism for the effective protection of the individuals and not simply an additional means to promote the powers of the Community Institutions.

Finally, the balance of interests should serve the principle of legal certainty in the Community. In an application for the suspension of a Community administrative measure the judge will always have to balance the applicant's interest with the protection of the Community interest to guarantee the direct application of the contested measure. It is for the judge to find the thin line between protecting the individual or Member State and safeguarding the uniformity of Community law. The suspension of the application of a Community measure should be no longer considered as an exceptional mechanism and in contrast, be used as an opportunity for the European Court of Justice to protect the interests that are more likely to be harmed. In particular, when the judge has a certain degree of proof that an administrative measure is invalid, he/she should proceed to the test of balancing interests. However, in such cases Community public interest and third parties' interests should not be the primary reason for the refusal of granting interim relief but should give priority to the principle of legality. This is based on the argument that the suspension of the application of a measure can be granted even if irreparable and serious harm is not proven, but the main action is "manifestly" well founded¹⁰³. The need for interim relief against a "manifestly" invalid administrative act is absolute, and cannot be limited by the occurrence of Community public interest, which will urge the European Court of Justice dismiss the application of suspension of the act. Community public interest cannot justify the enforcement of an invalid administrative

¹⁰² Case C-345/90P-R *European Parliament v. Hanning* [1991] ECR I-231, Case 45/87R *Commission v. France* [1987] ECR 1369, Case 61/77R *Commission v. Ireland* [1977] ECR 1411, Case 42/82R *Commission v. France* [1982] ECR 841, Case 171/83R *Commission v. France* [1983] ECR 2621, Case 293/85R *Commission v. Belgium* [1985] ECR 3521, Case 154/85R *Commission v. Italy* [1985] ECR 1753,

¹⁰³ Ep. Spiliotopoulos, *Administrative Law* (in Greek), 10th Edition, Sakkoulas, Athens, 2000, p. 564

measure. Furthermore in these cases there is no need of an irreparable and serious damage to the applicant, as it is almost certain that the contested Community measure will be ruled void in the main action. In several cases though, where the illegality of the administrative measure is obvious, the rejection of the application for the suspension of the act on the basis of the supremacy of the Community public interest can still be accepted. Besides in these situations the judge needs to bear in mind that even if the suspension is denied, the applicant will still win the case in the main action and therefore the administration (in other words the Community) will be asked to cover the potential damages. In this way the Court would still protect the applicant's rights and meanwhile benefit the Community interest. This approach can only be achieved if the European Court of Justice concentrates on the balance of interests test and puts to one side the potential harm.

Apart from the suspension of the application of the Community administrative act, in cases where the European Court of Justice can grant all other necessary interim measures, the relevance of balancing the interests is more straightforward. In these cases the judge has the freedom of ruling on all those measures which will better serve the particular interests without being obliged to either reject or refuse the protection of an interested party. The Community public interest and the applicant's interests can be combined and protected adequately through a number of interim measures and therefore interim relief can be used as mere settlement of the situation until final judgment is given.

II.2) Procedure

Active and passive legitimation, namely who is entitled to apply for the award of interim relief, is a further condition for the admissibility of the relevant application. Article 83(1) ECJ Rules of Procedure provides that only the party who is challenging the measure in proceedings before the Court can make an application for the suspension of the operation of that measure. An application for the adoption of any other interim measure is admissible only if any party makes it to the main proceedings¹⁰⁴. Thus the relevant provision makes a clear distinction between the applicant asking for the suspension of a measure and the applicant requesting all other

¹⁰⁴ Article 83(1) para. 2 ECJ Rules of Procedure, Article 104(1) para. 2 CFI Rules of Procedure

interim measures. This distinction is important when the judge has to deal with applications lodged by third parties. In an application under Articles 242 or 243 (ex Articles 185 and 186) EC a third party intervening in the main proceedings has no right to apply for such interim relief¹⁰⁵. This right is excluded from the wording of the relevant provisions in the rules of Procedure of the European Courts. The right to seek suspension of a contested measure is granted to the applicants in order to protect their own interests and not in order to avoid disadvantages which third parties could face if the application for interim relief were rejected¹⁰⁶. Furthermore, the third party intervention in the main proceedings cannot be considered as a *stricto sensu* party as he/she may only intervene in support of the arguments of one of the principal parties to the action¹⁰⁷. However, it has been argued that a third party to the main proceedings may be able to apply for interim measures under Article 243 (ex Article 186) EC¹⁰⁸. This argument was based on the fact that the interim measures under Article 243 EC are not so radical and could therefore be justified to protect the interests of the third party intervening. On the other hand, the suspension of an act is a more serious measure that safeguards the third parties' interests. Yet, if the third party was directly affected by the contested measure he/she could challenge the validity of the act on his/her own. However, third parties can still intervene in the proceedings for interim relief if their interests might be affected by the order¹⁰⁹.

The defendant (passive legitimation) in an application for interim relief is the opposing party in the main action, in other words, the defendant in the main proceedings¹¹⁰. However in *United Kingdom v. European Parliament*¹¹¹ the Court compelled the Commission to comply with the interim measure adopted in the case, even though the main action was not brought against that Community Institution.

¹⁰⁵ K.P.E.Lasok, *The European Court of Justice. Practice and Procedure*, London, Butterworths, 1994, p. 289

¹⁰⁶ Case 12/64R *Ley v. Commission* [1965] ECR 132, Case 22/75R *Küster v. European Parliament* [1975] ECR 277, Case 269/84R *Fabbro v. Commission* [1984] ECR 4333, Case 292/84R *Scharf v. Commission* [1984] ECR 4349

¹⁰⁷ Article 93(1e) ECJ Rules of Procedure; Article 115(2a) CFI Rules of Procedure; Article 37 E.C. Statute of the Court of Justice

¹⁰⁸ B.Pastor and E. Van Ginderachter, *La procédure en référé*, (1989) 25 R.T.D.E., p. 577,

¹⁰⁹ Case 3/75R *Johnson and Firth Brown v. Commission* [1975] ECR 1, Case 109/75R *NCC v. Commission* [1975] ECR 1193, Cases 113/77R and 13/77R-*INTN Toyo Bearing Co Ltd v. Council* [1977] ECR 1721; See J. Usher, *Presenting a Case before the European Court*, 1976 EL Rev., p. 110

¹¹⁰ R.Wainwright, *European Communities. Institutional and Jurisdictional Questions, Judicial Review/Article 186 EEC: Interim measures and Member States*, (1977) 2 EL Rev., p. 349

¹¹¹ Case 23/86R *United Kingdom v. European Parliament* [1986] ECR 1085

In order for an application for interim relief to be admissible a substantive action has to be lodged before the Court¹¹². However if the applicant delays lodging the application, the judge may dismiss the application, as the requirement of urgency might not be satisfied¹¹³. Under Article 83(3) of the ECJ Rules of Procedure and Article 104(3) of the CFI Rules of Procedure an application for the suspension of the operation of a measure, or for the adoption of other interim measures, has to be made with a separate document and must comply with Articles 37 and 38 ECJ Rules of Procedure, or Articles 43 and 44 CFI Rules of Procedure. The application will be held to be inadmissible if it is lodged before the Court in the same application as for the main action¹¹⁴.

II.3) Order-Decision on the application to grant interim relief

The President of the Court, before whom proceedings of the main action have been brought, has the power to decide on the applications for interim relief¹¹⁵. Under Article 85 ECJ Rules of Procedure and Article 106 CFI Rules of Procedure the President may refer the application to the Court, which in such circumstances has to postpone all other cases. Such reference is usually made when the application for interim relief is of great importance¹¹⁶. The President of the Court may prescribe a period of time within which the opposite party can submit written and oral observations¹¹⁷. However an order can be given, before the observations of the opposite party have been submitted, when there is a case of extreme urgency¹¹⁸.

¹¹² Article 83(1) ECJ Rules of Procedure; article 104(1) CFI Rules of Procedure; Case 18/57R *Nold v. High Authority* [1957] ECR 121, Case 3 to 18, 25 and 26/58R *Barbara Erzbergbau v. High Authority* [1960] ECR 220

¹¹³ Case C-87/94R *Commission v. Belgium* [1994] ECR I-1395

¹¹⁴ Case 108/63 *Officine Elettromeccaniche Ing A Merlini v. High Authority* [1965] ECR I, Case 32/64 *Italy v. Commission* [1965] ECR 365, Case 81/83 *Acciaierie and Ferrierre Busseni v. Commission* [1984] ECR 2951, Case T-107/94 *Kik v. Council and Commission* [1995] ECR II-1717, Case T-140/94 *Gutiérrez de Quijano y Llorens v. European Parliament* [1996] ECR II-689, Case T-146/95 *Bernardi v. European Parliament* [1996] ECR II-769, Case C-303/96P *Bernardi v. European Parliament* [1997] ECR I-1239, Case T-4/97 *D'Orazio and Hublau v. Commission* [1997] ECR II-1505

¹¹⁵ Article 36 E.C. Statute of the Court of Justice

¹¹⁶ B.Pastor and E.Van Ginderachter, *La procedure en référé*, (1989) 25 R.T.D.E., p. 579; G. Borchart, *The Award of Interim Measures by the European Court of Justice*, (1985) 22 CML Rev., p. 205; M. Slusny, *les mesures provisoires dans la jurisprudence de la Cour de Justice des Communautés Européennes*, Re.Belge de Droit Int., (1967), p. 136

¹¹⁷ Article 84(1) ECJ Rules of Procedure; Article 105(1) CFI Rules of Procedure

¹¹⁸ Article 84(2) ECJ Rules of Procedure; Article 105(2) CFI Rules of Procedure; Case 293/82R *De Compte v. European Parliament* [1982] ECR 4001; Case T-29/92R *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid v. Commission* [1992] ECR II-2161

Article 84(2) ECJ Rules of procedure and Article 105(2) CFI Rules of Procedure provide that, where the views of the defendant have not been heard before the order is given, it may be varied or cancelled. But the President still has the power to order a preparatory inquiry if this seems to be necessary and serves the aim of the interim relief proceedings¹¹⁹.

The decision of the President granting interim relief must take the form of a reasonable order, from which no appeal shall lie¹²⁰. However, Article 87 ECJ Rules of Procedure and Article 108 CFI Rules of Procedure state that a party may at any time apply for an order to be varied, or cancelled, on account of a change of circumstances¹²¹. In addition, Article 50 EC Statute of the Court of Justice states that an appeal will lie at the Court of Justice against the orders given by the Court of First Instance within two months of their notification¹²². The grounds of appeal concerning the order in interim relief proceedings are limited to points of law¹²³. Therefore it should rest on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant and the breach of Community law¹²⁴.

At this point it should be mentioned that there are few cases where an appeal was made against a decision of the CFI on an application for interim measures. The majority of the appeals have been dismissed¹²⁵. In these cases the ECJ upheld the

¹¹⁹ Article 84(2) ECJ Rules of Procedure; Article 105(2) CFI Rules of Procedure

¹²⁰ Article 86 ECJ Rules of Procedure

¹²¹ Case C-272/91R *Commission v. Italy* [1992] ECR I-3929, Case T-104/95R *Chalkidos v. Commission* [1995] ECR II-2235

¹²² Articles 111, 112 and 113 ECJ Rules of Procedure; Case C-149/95P(R) *Commission v. Atlantic Container Line* [1995] ECR I-2163, Case C-148/96P(R) *Goldstein v. Commission* [1996] ECR I-3883, Case C-268/96P(R) *SCK and FNK v. Commission* [1996] ECR I-4971, Case C-393/96P(R) *Antonissen v. Council and Commission* [1997] ECR I-441

¹²³ See K. Lenaerts, *The Development of the Judicial Process in the European Community after the Establishment of the Court of First Instance*, in Clapham (ed.), *Collected Courses of the Academy of European Law*, 1990 Vol. I-1, p. 53-113, at pp. 106-107

¹²⁴ Article 51 EC Statute of the Court of Justice

¹²⁵ Case C-97/94 P-R, *Schulz v. Commission*, [1994] ECR I-1701, Case C-12/95 P, *transacciones Maritimas SA (Tramasa), Makuspecca SA and Recursos Marinos SA v. Commission*, [1995] ECR I-467, Case C-149/95 P-R, *Commission v. Atlantic Container Line AB and others*, [1995] ECR I-2165, Case C-148/96 P(R), *Goldstein v. Commission*, [1996] ECR I-3883, Case C-268/96 P(R), *Stichting Certificatie Kraanverhuurbedrijf and Federatie van Nederlandse Kraanverhuurbedrijven v. Commission*, [1996] ECR I-4971, Case C-89/97 P(R) *Moccia Irme SpA v. Commission*, [1997] ECR I-2329, Case C-248/97 P(R), *Ferraro v. office for harmonization in the Internal Market*, [1997] ECR I-4731, Case C-43/98 P(R), *CamarSrl v. Commission and Council*, [1998] ECR I-1818, Case C-159/98 P(R), *Netherlands Antilles v. Council*, [1998] ECR I-4150, Case C-65/99 P(R), *Willeme v. Commission*, [1999] ECR I-1859, Case *Pfizer Animal Helath SA v. Council*, [1999] ECR I-8346, Case C-364/99 P(R), *DSR-Senator Lines GmbH v. Commission*, [1999] ECR I-8735, Case C-335/99 P(R), *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft & Co. KG and Others v. Commission*, [1999]

orders of the CFI and it seems that both European Courts follow the same principles when dealing with the granting or not of interim relief and the examination of the relevant conditions. The ECJ examined the way the CFI dealt with the several conditions of interim relief and stated that these conditions were cumulative, so that an application for interim measures must be dismissed if any one of them is absent. Such conclusion has been repeated in several decisions of the ECJ in order to state that in an appeal pleas which relate to the existence of a *prima facie* case but do not call into question the lack of other conditions cannot form grounds for setting aside the order under appeal¹²⁶. In a number of appeals the ECJ had the chance to deal with the condition of *prima facie*, and it concluded that the CFI had not erred in law in its assessment¹²⁷. In *Schulz* the ECJ confirmed the CFI's decision that it was not open to individuals to challenge a refusal by the Commission to initiate proceedings against a Member State for failure to fulfil its obligations and therefore it dismissed the application for interim relief as inadmissible¹²⁸. In *Moccia Irme SpA*¹²⁹ both the ECJ and the CFI reached the same conclusion as regards the nature of the contested measure. Both Courts observed that the decision had a negative character and an application for suspension against such decision cannot be envisaged, since the grant of suspension could not have the effect of changing the applicant's position. Furthermore as regards the non-material damage that the applicant would incur owing

ECR I-8708, Case C-300/00 P-R, *Federacion de Cofradias de Pescadores de Guipuzcoa and others v. Council and Commission*, [2000] ECR I-8797, Case C-317/00 P(R), *Invest Import und Export GmbH and Invest Commerce v. Commission*, [2000] ECR I-9541, Case C-361/00 P(R), *Cho Yang Shipping Co.Ltd v. Commission*, [2000] ECR I-11657, Case C-7/01 P(R), *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission*, *City Electrical Factors BV and CEF Holdings Ltd*, [2001] ECR I-2559, Case C-477/01 P(R), *Reisebank AG v. Commission*, [2002] ECR I-2117, Case C-480/01 P(R), *Commerzbank AG v. Commission*, [2002] ECR I-2129, Case C-208/03 P-R, *Le Pen v. European Parliament*, [2003] ECR I-7939.

¹²⁶ Case C-268/96 P(R), *SCK and FNK v. Commission*, [1996] ECR I-4971, para. 30-31, Case C-7/01 P(R), *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission*, [2001] ECR I-2559, para. 50, Case C-248/97 P(R), *Ferrao v. Office for Harmonization in the Internal Market*, [1997] ECR I-4731, Case C-43/98P(R), *Camar Srl v. Commission and Council*, [1998] ECR I-1818, para. 41, Case C-159/98 P(R), *Netherlands Antilles v. Council*, [1998] ECR I-4150, para. 111.

¹²⁷ See Case C-300/00 P(R), *Federacion de Cofradias de Pescadores de Guipuzcoa and others v. Council and Commission*, [2000] ECR I-8797, where the ECJ confirmed the CFI's findings on the 'individual concern' test so far as the applicants were concerned. See also Case C-317/00 P(R), *Invest Import und Export GmbH and Invest Commerce v. Commission*, [2000] ECR I-9541.

¹²⁸ Case C-97/94 P(R), *Schulz v. Commission*, [1994] ECR I-1701, para. 13.

¹²⁹ Case T-164/96 R, *Moccia Irme SpA*, [1996] ECR II-2261, para. 28, Case C-89/97 P(R), *Moccia Irme SpA v. Commission*, [1997] ECR I-2329, para. 45

to the effects of the contested measure, the ECJ in *Willeme*¹³⁰ upheld the CFI's decision, that the condition of urgency was not met, in so far as the purpose of interim relief is not to ensure that the damage is made good but to ensure that the judgment on the substance of the case takes full effect. In addition the ECJ agreed with the CFI's balancing of interests in *Pfizer*¹³¹, where it compared the extent and seriousness of the risk linked to the use of a substance to animal feed with the damage claimed to the applicant and reached the conclusion that such damage cannot outweigh the damage to public health by the suspension of the contested regulation. Finally in a number of cases the CFI and the ECJ had to deal with the issue of providing a bank guarantee. In *Transacciones Maritimas*¹³² the CFI ruled that the balancing of interested required the suspension of the contested measures to be made conditional on the provision of a bank guarantee. In an appeal brought before the ECJ for the first time the appellants claimed an infringement of the principle of effective judicial protection and the principle of proportionality with regard to the bank guarantee. The ECJ dismissed the argument and stated that in assessing the ability of undertakings to furnish a bank guarantee, regard may be given to the circumstances of the undertaking which must lodge the guarantee but also to the financial possibilities of its shareholders, and to the resources available, as a whole, to the group of undertakings to which it belongs¹³³. On that ground the ECJ concluded that when the CFI required the appellants to provide a bank guarantee exceeding their own funds, it did not infringe the principle of effective judicial protection and it was proportionate in order to safeguard the Community interest. It seems that the order of the CFI and the dismissal of the relevant appeal from the ECJ are fully in conformity with the lodging of security as expressed in Article 107(2) of the Rules of Procedure of the CFI¹³⁴. These orders have been confirmed in subsequent appeals in competition cases, where the CFI obliged the applicant to set up a bank guarantee as a condition imposed in return for staying enforcement of a fine imposed by the Commission for the infringement of the

¹³⁰ Case C-65/99 P(R), *Willeme v. Commission*, [1999] ECR I-1859, para. 62

¹³¹ Case C-329/99 P(R), *Pfizer Animal Health SA v. Council*, [1999] ECR I-8346

¹³² Case C-12/95 P, *Transacciones Maritimas SA (Tramasa), Makuspesca SA and Recursos Marinos SA v. Commission*, [1995] ECR I-467

¹³³ *Ibid.*, para. 12. Cf. in Case C-364/99 P(R), *DSR-Senator Lines GmbH v. Commission*, [1999] ECR I-8735

¹³⁴ See T. Tridimas, note on Case C-12/95 P, *Transacciones Maritimas SA (Tramasa), Makuspesca SA and Recursos Marinos SA v. Commission*, [1995] ECR I-467, (1996) 33 CML Rev., p. 371-379, at p. 376

competition rules¹³⁵. The ECJ repeated that requiring security to be lodged was expressly provided in the Rules of Procedure of both courts and was a general and reasonable policy pursued by the Commission.

Although the ECJ dismissed the majority of appeals brought before it by concluding that there was no error in law on the part of the CFI's findings in applications for interim relief, there are some cases where the CFI's orders were set aside. As the number of these cases is quite low, it is wiser to avoid general conclusions with regard to possible differences in approach between the ECJ and the CFI in granting interim measures. The ECJ dealt with several factors while exercising its appellate jurisdiction and ruled out several conclusions made by the CFI in applications for interim relief before it. In *Antonissen*¹³⁶ the ECJ considered incompatible with the right of individuals to effective judicial protection the absolute prohibition ruled from the CFI in an application for interim relief of a measure granting, in way of advance, part of the compensation claimed in the main action. Such payment could prove necessary in order to ensure the effect of the final judgment and is justified with regard to the interests involved, without necessarily prejudging the decision in the main proceedings¹³⁷. Furthermore in another appeal the ECJ did not agree with the CFI's view that the uncertainty of obtaining compensation for pecuniary damage in action for damages brought by an applicant can in itself be regarded as a factor establishing that such damage is irreparable¹³⁸. The ECJ added that in interim proceedings the possibility of obtaining such compensation is necessarily uncertain. Different conclusions were also reached when the European courts had to balance the interests of the parties. As it is argued this balancing test poses the most delicate problems and therefore the judge's discretion to apply this test can qualify the scope of appellate review from the ECJ¹³⁹. In *Commission v. Gerot*

¹³⁵ Case C-364/99 P(R), *DSR-Senator Lines GmbH v. Commission*, [1999] ECR I-8735, Case C-335/99 P(R), *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft & Co. KG and Others v. Commission*, [1999] ECR I-8708, Case C-361/00 P(R), *Cho Yang Shipping Co. Ltd v. Commission*, [2000] ECR I-11657

¹³⁶ Case C-393/96 P(R), *Antonissen v. Council*, [1996] ECR I-444

¹³⁷ *Ibid.*, para. 37, 39

¹³⁸ Case C-401/01 P(R), *Commission v. Euroalliances and Others*, [2001] ECR I-10367, para. 71-72

¹³⁹ See previous section of this Chapter on the analysis of this test. See also T.Trdimas, *supra* n° 134, p. 379

*Pharmazeutika*¹⁴⁰ the appellant Institution complained that the CFI failed to apply properly the balance of interests test, when it concluded that the operation of the contested decision would entail the definitive loss of the applicant's position to the market, such risk outweighing the protection of public health. The ECJ did not agree with that conclusion and stated that the requirements of the protection of public health must unquestionably be given precedence over economic considerations¹⁴¹. It went on to analyse the circumstances of the particular case and concluded that the risk of public health would be so high by the suspension of the contested decision that the harm caused could not be remedied if the main action was finally dismissed¹⁴².

It seems that the appellate jurisdiction of the ECJ against orders of the CFI on applications for interim relief is not extensively exercised. It remains to be seen whether applicants will try in the future to make appeals against orders that affect their rights. It seems though that the requirement of an appeal to be limited to points of law only might justify the small number of appeals against orders of interim relief. It is not yet clearly defined by the ECJ which requirements in order to grant interim relief involve points of law or points of fact.

At the end of the procedure for interim relief the President will reach a decision that concludes the proceedings. As it has been already clarified,¹⁴³ there are three different types of orders which can be given. Firstly, the application for interim relief can be rejected as inadmissible due to the lack of any of the procedural requirements needed under the relevant provisions mentioned above. Secondly, the President may dismiss the application for granting interim measures if one or more of the required substantive conditions have not been met. If the application is dismissed, the party can still bring another application for interim relief before the Court based on new facts which justify the grant of the interim measure sought¹⁴⁴. Finally, the President may grant interim relief if he/she is convinced that all procedural requirements have been satisfied and that all arguments put forward by the parties are sound and prove that interim relief is necessary.

¹⁴⁰ Case C-479/00 P(R), *Commission v. Gerot Pharmazeutika GmbH*, [2000] ECR I-3121. See also Case C-365/03 P(R), *Industrias Químicas des valles SA v. Commission*, [2003], not yet published.

¹⁴¹ *Ibid.*, para. 100

¹⁴² *Ibid.*, para. 104

¹⁴³ B.Pastor and E. Van Ginderachter, *La procédure en référé*, (1989) 25 R.T.D.E., p. 617

¹⁴⁴ Article 88 ECJ Rules of Procedure; Article 109 CFI Rules of Procedure; Case 51/79RII *Buttner v. Commission* [1979] ECR 2387

The order granting interim relief has a temporary effect and is of a limited duration. Article 86(4) ECJ Rules of Procedure and Article 107(4) CFI Rules of Procedure state that it should be without prejudice to the decision on the substance of the main action. According to the nature of interim relief and its aim in protecting the interests of the parties until final judgment is given, the order granting interim relief has a limited effect. Compared to a judgment of the Court the order of interim relief is limited to the protection of the position of the applicant and not third parties¹⁴⁵. The main object of the interim relief procedure and its order is to shape a new situation (suspension- other interim measures) which will provisionally define the legal relationship of the parties. Therefore, a temporary situation arises: one party obtains the new right to safeguard his/her substantial right until final judgment is given on the latter; the other party has the obligation to tolerate the temporary situation until the final judgment in the main action. This means that for a limited period of time, the order granting interim relief cannot be disputed or ignored.

The temporary effect of the order means that the case cannot be considered as a *res judicata*. In contrast with the judgment in the main action, the order in interim relief proceedings does not put an end to the litigation, and therefore does not create legal security for the parties. However, it still has consequences for the parties¹⁴⁶. Thus the President will reject the application for interim relief made by the same parties and under the same facts, as inadmissible based on the fact that the Court has already ruled on the case. The limited duration of the order is provided in the relevant articles, which provide that interim measures adopted will lapse on the date the order has fixed, or when final judgment is delivered¹⁴⁷. This provision reflects the limited effect of the order and therefore the President may not fix a date after delivery of the final judgment. In such a situation the measure will lapse automatically when the final judgment is given and cannot be extended past the specified date set.

Finally, the order for interim relief is enforceable. The enforcement of such order derives from the aim achieved with interim relief under Article 242 and 243 (ex Articles 85 and 186) EC. Furthermore, the enforceability of the order derives from the wording of Article 244 (ex Article 187) EC, which states that all judgments shall be

¹⁴⁵ Case 23/86R *United Kingdom v. European Parliament* [1986] ECR 1085

¹⁴⁶ B. Pastor and E. Van Ginderachter, *La procédure en référé*, (1989) 25 R.T.D.E., p. 619; G. Vandersanden and A. Barav, *Contentieux Communautaire*, Bruxelles, Bruylant, 1977, p. 431

¹⁴⁷ Article 86(3) ECJ Rules of Procedure; Article 107(3) CFI Rules of Procedure; K.P.E.Lasok, *The European Court of Justice. Practice and Procedure*, London, Butterworths, 1994, p. 294

enforceable. In particular, the order suspending the application of a Community Institution's act obliges the latter not to enforce the contested act, and not to adopt and enforce a new act with the same content. In addition, the order granting other interim measures (money payments, production of documents) obliges the defendant to act according to these interim measures. The effect of an order in interim relief proceedings was dealt in *R v. Secretary of the State for Transport, ex p. Factortame Ltd*¹⁴⁸. It was held that such an order takes immediate effect and has the same force and direct effect as any other order of the court or provision of Community law. The parties have to comply with it and if they fail to do so, it will be considered a breach of Community law.

However, even if the wording of Article 244 (ex Article 187) EC is concentrated on "judgments", Article 89 ECJ Rules of Procedure and Article 110 CFI Rules of Procedure mention the suspension of the enforcement of the "decisions" of the European Courts, which appears to be a better reading¹⁴⁹. Apart from those provisions, the enforcement of the order granting interim relief is justified under Article 86(2) ECJ Rules of Procedure and Article 107(2) CFI Rules of Procedure, which provide that the enforcement may be conditional on the lodging of security by the applicant¹⁵⁰. However, the lodging of security does not serve as compensation to the opposing party for any damage caused as a result of the grant of interim relief, if the applicant finally loses in the main action. The European Court of Justice has ruled though that, in proceedings under Article 169 EC Treaty, the Commission as an applicant for relief may be liable in damages to the opposing party-Member State in respect of any loss resulting from the grant of interim relief, if finally the Commission loses in the main proceedings¹⁵¹. As it has been argued above, this suggestion from the European Court of Justice cannot in principle apply in all cases. The applicant cannot be considered liable for the loss that may occur directly from the granting of interim relief, as the cause of the loss is the very decision of the Court to grant such relief. Furthermore, the applicant cannot be liable because he/she decided to exercise

¹⁴⁸ [1997] Eu.L.R. 475

¹⁴⁹ B.Pastor and E. Van Ginderachter, *La procédure en référé*, (1989) 25 R.T.D.E., p. 618

¹⁵⁰ Case 86/82R *Hasselblad (GB) Ltd v. Commission* [1982] ECR 1555, Case 263/82R *Klockner Werke AG v. Commission* [1982] ECR 3995, Case 160/84R *Oryzomyli Kavallas v. Commission* [1984] ECR 3217, Case C-195/90R *Commission v. Germany* [1990] ECR I-3351, Case T-308/94R *Cascades v. Commission* [1995] ECR II-265, Case C-12/95P *Tramasa v. Commission* [1995] ECR I-467

¹⁵¹ Case C-195/90R *Commission v. Federal Republic of Germany* [1990] E.C.R. I-3351

the right to apply for interim relief¹⁵². However the opposing party may claim compensation if the applicant is liable, based on the general obligation to compensate, and not on the fact that there was a decision granting interim relief, which should not be given in the first place.

¹⁵² K.P.E. Lasok, *supra* n° 100, p. 298

CHAPTER III

EFFECTIVE PROTECTION OF COMMUNITY RIGHTS BEFORE NATIONAL JURISDICTIONS

III.1) The position of the individual in the Community legal order

The Community system of judicial protection as provided by the Treaties has revealed some shortcomings and gaps. The protection of individual rights deriving from Community law received relatively little attention. The system underestimated the role that individuals would acquire in the process of developing the Community legal order¹. As a result of this shortcoming, the task of fashioning a wider concept of the protection of the individual in the Community legal order fell to the European Court of Justice².

In its early jurisprudence, the Court sought, first of all, to establish the doctrines of direct effect and supremacy in order to guarantee the full effect of Community law throughout the Member States³. Although this is a matter widely analyzed by academics, it is worth mentioning in order to show the Court's desire to place the individuals within the new legal order, involving them in the progressive, legal integration of the European Community. In the famous *Van Gend en Loos*⁴ the Court stressed the role of individuals and showed that their position has played an important part in the Community legal order since the earliest years. The European Court of Justice ruled that the Treaty was more than an agreement, which merely created mutual obligations between the contracting states. This constitutional charter also

¹ G. Bebr, *Court of Justice: Judicial Protection and the Rule of Law*, in *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers*, edited by D. Curtin and T. Heukels, Vol. II, 1994, p. 303-333, at p. 304

² D. O'Keefe, *General Course in European Community Law, The Individual and European Law*, in *Collected Courses of the Academy of European Law*, Volume V, Book 1, p. 64

³ For a more detailed analysis of the principles of direct effect and of supremacy of Community law see: G. Bebr, *Agreements Concluded by the Community and Their Possible Direct Effect: From International Fruit Company to Kupferberg* (1983) 20 CML Rev., p. 35; P. Pescatore, *The Doctrine Of "Direct Effect: An Infant Disease in Community Law* (1983) 8 EL Rev., p. 155; D. Curtin, *Directives: The Effectiveness of Judicial Protection of Individual Rights* (1990) CML Rev. 27, p. 709; P. Eleftheriadis, *The Direct Effect of Community Law: Conceptual Issues* (1996) 16 YEL, p. 205; P. Craig, *Directives: Direct Effect, Indirect Effect and the Construction of National Legislation* (1997) 22 EL Rev., p. 291; T.C. Hartley, *The Foundations of the European Community Law*, US:Oxford (4th edition), 1998, p. 187; A. Arnulf, *The European Union and its Court of Justice*, Oxford University Press, 1999, p. 75.

⁴ Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I

included imposing obligations on people and conferring rights upon them which become part of their legal heritage⁵. As a result in the *Van Gend en Loos* judgment individuals could rely on directly effective Treaty articles. The Court created the possibility for individuals to invoke and enforce Community Law before their national jurisdictions, with the aim of arriving at a uniform interpretation of the Treaty through the preliminary reference procedure of Article 234 EC Treaty⁶. The Court established that the vigilance of the individuals' rights was the true cornerstone of the effectiveness of Community law⁷.

Apart from direct effect, which originally was defined as the creation of rights for individuals which national courts must protect⁸ the priority for Community law in dealing with conflicting national legislation is the other cornerstone, which enforced the concept of the protection of Community rights conferred on individuals. In *Costa v. Enel*⁹ the Court established the principle of supremacy, without which individuals' rights would not be effectively protected if national jurisdictions could give priority to national legislation. Therefore the Court's judgment in *Costa v. ENEL* is the logical consequence of the principle set out in *Van Gend en Loos*, that Community law confers rights on individuals.

It was after a decade, in the late 1970s in the celebrated *Simmenthal*¹⁰ that the Court further supplemented the fundamental principle of direct effect by establishing the doctrine of the primacy of Community law. It imposed the duty on national courts to disapply any national legislation in the event of a conflict between Community law and national law. Although the Court was primarily concerned with the full effectiveness of Community law within the national jurisdictions, the impact of this judgment on the protection of individuals is undeniable. The Court held that national courts had to apply Community law in its entirety and protect rights, which Community law confers on individuals. In addition, national courts had to set aside any contrary national law rule, whether prior, or subsequent, to the Community law,

⁵ Ibid., at 12

⁶ D.O'Keeffe, *supra* n° 2, p. 66

⁷ D. Curtin and K. Mortelmans, *Application and Enforcement of Community Law by the Member States: Actors in Search of A Third Generation Script*, in *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers*, edited by D. Curtin and T. Heukels, Vol. II, 1994, p. 423-466, at p. 423

⁸ B. De Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in *The Evolution of EU Law* edited by P. Craig and G. De Burca, p. 177-213, at p. 187; See also S. Prechal, *Does Direct Effect Still Matter?* (2000) 37 CML Rev., p. 1047-1069

⁹ Case 6/64 *Costa v. ENEL* [1964] ECR 585

¹⁰ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A* [1978] ECR 629

in order to safeguard the individual's Community rights. The Court tried to show that Community law was a source of rights for all individuals and national courts were bound to provide protection for these rights.

Consequently, the European Court of Justice developed a remarkable case law related to the judicial protection of the individual. Primarily concerned with the direct effect of Community law and the priority of the latter before national courts, these first-generation cases¹¹ established the foundations of the Community legal order and tried to emphasise the position of the individual within it. At that time the Court was more focused on the national economic law provisions and held that directly effective Treaty provisions, as well as regulations and directives, would make national measures inapplicable¹². At that stage the Court of Justice recognised that individuals were to play a significant role in the realisation of the objectives of the Treaty of Rome by conferring upon them rights deriving from Community law. Without these principles, interested parties would be deprived of Community protection. These judgments have helped to place the individual at the heart of European law¹³. In contrast to international law agreements, where action is taken by governments and institutions, in the European legal order the individual is a substantive participant in the integration process. However, as is going to be analysed in the following section, the protection of the individual is mainly dependent upon the acceptance of national courts of their duty to apply and enforce Community law. Therefore, it should be kept in mind that the legal position of individuals is also determined by the judicial enforcement of Community law by national authorities.

¹¹ This notion was first introduced by Mertens de Wilmars when he referred to the formula "problems of second generation" in his general report for the London Fide meeting in 1980. See M. De Wilmars, *L'efficacité des différentes techniques nationales de protection juridique contre les violations du droit communautaire par les autorités nationales*, in *Remedies for breach of Community law*, Vol. I, F.I.D.E., Sweet and Maxwell, London, 1980, p. I.2

¹² D. Curtin and K. Mortelmans, *supra* n° 7, p. 432

¹³ B. de Witte, *supra* n° 8, p. 205

III.2) The role of Member States in the protection of individuals' EC rights

Progressive legal integration has gradually linked the national judicial systems with the Community legal order¹⁴. Member States have been called upon to provide effective application of Community law and enforcement of Community rights of individuals. Primary and secondary Community law must be fully applied throughout the Community without Member States being able to invoke any national law provision to override it¹⁵. This effective application entails that, in the event that Community law is not correctly applied on a national level, it is for the national authorities of each Member State to provide adequate ways for the effective enforcement of Community law. Therefore the European Court of Justice understood early on that, even if the principles of direct effect and supremacy were established, it remained for the Member States to play an essential role for the application and enforcement of Community law in order to protect the Community rights of individuals.

The European Court of Justice attempted to articulate the interplay of Community law with national law and the co-operation of national Courts with Community provisions by declaring that the principles of direct effect and supremacy, even if they are not clearly expressed in the Treaty, are part of the European constitutional doctrine. However, whilst this might seem to be taken for granted, it is important to look at the other side of the coin too. By establishing the doctrine of direct effect and supremacy, the European Court of Justice clearly views EC Law as having primacy over national law. However, practical implementation of Community law is undertaken at a national level and hence is dependent on national provisions and on the various restrictions and differences of national legal systems¹⁶. Member States have been obliged therefore in order to join the European Community, to make basic constitutional changes¹⁷. National authorities (judicial, administrative) following

¹⁴ G.Bebr, *supra* n° 1, p. 316; For a general analysis of the interrelationship of Member States and the Court of Justice see U. Everling, *The Member States of the European Community before their Court of Justice*, (1984) 9 EL Rev., p. 215-241

¹⁵ Case 48/71 *Commission v. Italy* [1972] ECR 527

¹⁶ G. De Búrca, *National Procedural Rules and remedies: The Changing approach of the Court of Justice*, in *Remedies for Breach of EC Law*, edited by J. Lonbay and An. Biondi, 1997, John Wiley and Sons, p. 37.

¹⁷ B.De Witte, *supra* n° 8., p. 199

for many years their national legal culture¹⁸ and their national legal doctrines are now under the duty to consider Community law even in cases where national provisions are the only applicable legislation. National judges are now considered to have a dual task. Apart from applying the domestic law, they are part of the Community legal order, urged to apply, enforce Community Law and protect Community rights of individuals. In the absence of various European Courts with exclusive jurisdiction to apply Community Law, it is for the national courts and tribunals to safeguard the Community law rights conferred to individuals. There are only two Community courts and hence Community law could not be adequately applied and enforced without the contribution of national jurisdictions. The national courts are the courts to which natural and legal persons may turn in order to bring a claim against an illegal action of a national authority, or when their rights deriving from Community law have been infringed. The national judge is a Community judge at the same time. Every national court is a Community court with the jurisdiction to apply Community provisions relevant to the cases brought before it. This duty to apply Community law overrides the duty to apply national law. All cases, which do not fall within the jurisdiction of the European Court of Justice and of the Court of First Instance, are dealt with before the national courts, which have the power to review the compatibility of national legislation with Community law. Within the legal system of the Member States, the national courts are the bridgehead of the Community legal order and protect the rights of individuals deriving from Community law through a dialogue with the European Courts¹⁹.

III.3) The conflict between the effective protection of individuals' EC rights and national procedural rules

Whereas the EC Treaty provides a uniform and complete system of judicial review of Community measures by the Court of Justice and the Court of First Instance, it remains laconic,²⁰ or even silent, when it comes to the application and the

¹⁸ W. Mattli and A. Slaughter, *The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints*, in *The European Courts and National Courts*, edited by Slaughter, Sweet, Weiler, 1998, Hart Publishing Oxford, p. 271.

¹⁹ K. Lenaerts and D. Arts, *Procedural Law of the European Union*, London, 1999, Sweet and Maxwell, p. 3.

²⁰ M. Struys, *Le droit communautaire et l'application des règles procédurales nationales*, JT 2000 Mars N° 67, p. 49

enforcement of Community law in the national jurisdictions. As a consequence of the decentralised EC legal system, the protection of Community rights of individuals before national courts is dependent upon national procedural rules. The efficacy and capacity of equal application and protection of Community rights relies upon the consistency in approach across the Community²¹. This unity of interpretation is not only expected from the European Courts and their decisions but mainly from the national courts. It is therefore for the national courts of the Member States to accomplish this difficult role: the uniform and effective protection of Community rights within the framework of national procedural law.

Despite the attention paid on the enforcement of Community Law in national legal systems, there is a grey area²² where Community law seems to stop and national law takes over, which generates ambiguous situations. The lack of a comprehensive judicial system applicable to national jurisdictions for the application and the enforcement of Community law creates obstacles to the uniform protection of Community rights²³. In order to understand this problem, one has to bear in mind that there are 25 different national legal systems in the European Union, where each one has its own traditions, principles of law and legal culture. Each legal system of the various Member States have rules governing the organisation of the judicial system, procedural rules, remedies, enforcement measures, time limits. National judges have their own way to interpret and apply law based on the national legal doctrines, constitutional principles and specific procedures. Hence the operation of Community law is to a large extent determined by each national procedural environment. This diversity of national legal systems has potential to conflict with the principle of uniformity, which Community law needs to apply for the effective protection of individuals' rights throughout the European Union²⁴. Correct enforcement, and

²¹ C. Himsworth, *Things Fall Apart: The harmonisation of Community Judicial Procedural Protection Revisited*, (1997) 22 EL Rev., p. 291.

²² S. Prechal, *Community Law in National Courts: The Lessons from Van Schijndel*, (1998) 35 CML Rev., p. 681

²³ J. Bridge, *Procedural Aspects of the Enforcement of European Community Law through the Legal Systems of the member States*, (1984) 9 EL Rev., p. 32

²⁴ This conflict was apparent from the early stages of the creation of the European Union when various Member States with different legal traditions found difficulties in accepting the principles of primacy and of direct effect of Community law over their national legislation. Furthermore the recognition of Community measures and policies is not always the same across Europe. Governments of each Member State react according to their own political, economical and social advantages, creating sometimes obstacles to the uniform application of Community law. The Community Institutions have to confront countries with a common law background as well as countries with civil law principles.

therefore effective protection, of Community rights before national jurisdictions must be achieved through the creation of adequate sanctions for affected individuals²⁵.

As mentioned above, the EC Treaty remains silent regarding the matter of enforcement of Community law in the national level. The reason for such a denial has been the object of a large amount of discussion from academic lawyers and analysts. It is however established and justified from the Treaty that there is a lack of harmonisation²⁶ on the field of procedural rules appointed to the national jurisdictions. It is a field where the Community has left competence to the national authorities to organise the full effectiveness of Community law before national administrative and legal authorities²⁷. Based on the principle of sovereignty, and on the institutional autonomy of Member States, the Treaty through the European Court of Justice has recognised the autonomy of Member States on the field of procedural law. The competent authorities, and the procedures which must be utilised in order to apply and enforce Community Law, are determined by national constitutional formulas²⁸.

However, this principle of procedural autonomy has its limitations as national courts are under the duty to apply Community law and respect the principle of full effectiveness of Community rights of individuals. Effective protection means that substantive Community rights conferred to individuals should be complete, including substantive and procedural elements²⁹. National courts have to fully apply Community rules, ensure uniformity of interpretation and apply conditions equivalent to the conditions applicable to infringements of national legislation. The principle of effectiveness requires national jurisdictions to give effective remedies to protect the rights deriving from Community law and to take all necessary judicial action to permit a litigant to raise any issue of Community law, which affects its private

²⁵ Krislov, Ehlermann and Weiler, *The political organs and the decision-making process in the United States and the European Community*, in *Integration through Law*, Vol I, *Methods, Tools and Institutions*, Book 2: *Political Organs, Integration techniques and judicial process*, Berlin, 1986, p. 62

²⁶ Although there is no consistent harmonised system, secondary Community legislation includes provisions dealing with procedural matters. See, e.g., Dir. 89/655 [1989] OJ L395/33 which provides remedies in the field of public procurement, Dir. 89/552 [1989] OJ L298/23 which provides mechanisms for resolving disputes over the content of television broadcasts, Dir. 98/27 [1998] OJ L166/51 which harmonises procedures for the protection of consumers' interests

²⁷ R. Kovar, *Droit Communautaire et droit procedural national*, (1977) C.D.E., p. 232

²⁸ R. Kovar, *Voies de droit ouvertes aux individus devant les instances nationales en cas de violation des normes et décisions du droit communautaire*, Colloque: *Les recours des individus devant les instances nationales en cas de violation du droit européen*, Université Libre de Bruxelles, Inst. D'Etud., Euro., 1975, p. 248.

²⁹ J. Temple Lang, *The Principle of Effective Protection of Community Law Rights*, in *Judicial Review in European Union Law*, edited by D. O'Keefe and A. Bavasso, Kluwer Law International, 2000, p. 237

interests. In order to achieve an efficient level of effectiveness and uniformity of protection Member States are required to eliminate all potential gaps in the judicial system and supplement or modify national legislation to ensure that Community law is promptly protected.

The situation described above has been analysed by academics for some time. Arguments have been expounded in favour of, and against, the existence of dualism of principles where procedural autonomy conflicts with the principle of effective protection of Community rights. The term “procedural autonomy” does not appear in the case law of the Court of Justice³⁰. Judge Kakouris explains that the application of national procedural rules does not constitute a manifestation of the sovereignty of the Member States. On the contrary, such application could be considered provisional and occurs only as long as there is no body of Community procedural rules and only insofar as it ensures the effectiveness of substantive Community law. Similarly,³¹ where there are no specific Community rules for the actual operation of Community law at a national level, it is for the Member States to determine the competent courts and to lay down rules for legal proceedings which serve as a “vehicle” for the enforcement of Community law. Furthermore, it has been recognised that the balance between ensuring the full application of Community rules before national jurisdictions and national procedural law is a tough task. However, it is admitted that the effectiveness of Community law is subject to a dual vigilance, exercised both by the Community as well as national courts³². The principle of procedural autonomy was justified from the lack of any effort of harmonising procedural measures. There has been a resistance to any harmonisation of national court procedures. This approach has been paraded under the broad banner of subsidiarity-the Community should not reach down unjustifiably into matters within the legitimate competence of Member States³³.

Although Member States possess procedural autonomy in order to organise the effective protection of Community rights before national legal authorities, such power should not be unlimited. As long as the Community legislator has never entered this

³⁰ C.N. Kakouris, *Do the Member States possess judicial procedural “autonomy”?* (1997) 34 CML Rev., p. 1389.

³¹ S.Prechal, *EC Requirements for an Effective Remedy*, in *Remedies for Breach of EC Law*, edited by J. Lonbay and An. Biondi, 1997, John Wiley and Sons, p. 3.

³² An. Biondi, *The European Court of Justice and certain National procedural Limitations: Not Such a Tough Relationship*, (1999) 36 CML Rev., p. 1284

³³ C. Himsworth, *supra* n° 21, p. 291.

domain, it is for the European Court of Justice to impose these limitations, to build a framework for the uniformity of application of Community law. Through its case law, which will be analysed below, Community law sets out minimum standards for effective judicial protection. The European Court of Justice is asked to deal with the applicable conditions of judicial protection as well as with the guaranties that should be apparent before national jurisdictions when Community rights are in question.

III.4) Community legislation as legal basis for the interplay of Community and national law

Before considering the judgments of the European Court of Justice and its interpretation of the principle of full effectiveness of Community law before national authorities, it is essential to deal with the primary Community legislation, which forms the legal basis for the relationship between Community law and national legal systems. The Treaty contains provisions related to the powers and the duties of national jurisdictions when applying, and protecting, rights deriving from Community law.

The primary responsibility of national courts for the effective application and protection of Community rights is expressed through the proceedings of preliminary rulings. This procedure is considered to be essential in order to ensure that Community law is equally applied in all Member States. Article 234 (ex. Art. 177) EC³⁴ gives the power to the Court of Justice to give a preliminary ruling to a question appointed to it from a national court on the interpretation of Community law and the validity of Community acts. As far as the Court of Justice is concerned, Article 234 (ex. Art. 177) EC expressed a twofold need “to ensure the utmost uniformity in the application of Community law and to establish for that purpose effective co-operation

³⁴ Article 234 EC Treaty reads as follows: *The Court of Justice shall have jurisdiction to give preliminary rulings concerning:*

- a) the interpretation of the treaty;*
- b) the validity and interpretation of acts of the institutions of the Community and of the ECB;*
- c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.*

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision of a question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

between the Court of Justice and national courts”³⁵. The right use of preliminary references can provide the opportunity for the European Court of Justice to deal with the validity of Community acts, being the only court with such a power, thereby safeguarding the unity of Community law. This sole power of the European Court of Justice to deal with the legality of Community measures reflects the aim to protect the uniformity of Community law across the national legal orders, the need to avoid divergent opinions between several national courts on the validity of Community acts and as a way of serving the fundamental principle of legal certainty throughout the European Union. The relationship between the European Court of Justice and the referring national court is, and should be, co-operative. The European Court of Justice gives rulings to the questions addressed and it is for the national court to interpret it and take the final decision. However, the European Court of Justice has been sometimes criticised for its judgments, as its responses do not leave much leeway to the national jurisdictions for dealing with the case before them³⁶. The preliminary ruling procedure does not create a superior court to deal with the matters. The European Court of Justice should not therefore be considered as a court of last resort, taking advantage of the large number of references brought before it in order to create judge-made law. The aim of this procedure is not just to highlight and oblige the Member States to comply with their Community obligations but to form a kind of dialogue, in which the two courts try to find an appropriate solution, which is in conformity with the requirements of Community law for uniform protection in all Member States³⁷.

The Treaty contains another provision, Article 10 (ex Art. 5) EC³⁸, which establishes the principle of co-operation between Community law and the Member States. As mentioned above the institutional and procedural autonomy of Member States could not in any way be exercised without any limitations. Such absolute power

³⁵ Case C-221/88 *Busseni* [1990] ECR I-495, para. 13.

³⁶ H. Rasmussen, *Remedying the crumbling EC Judicial System*, (2000) 37 CML Rev., p. 1101

³⁷ For further analysis on preliminary rulings see: G. Isaac, *Droit communautaire general*, Masson, Paris, 1992, p. 280; D. Anderson QC and M. Demetriou, *References to the European Court*, Sweet and Maxwell, London, 2002; T. Tridimas, *Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Procedure*, (2003) 40 CML Rev., p. 9-50

³⁸ Article 10 reads as follows: *Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.*

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

is capable of jeopardising the uniformity and full effectiveness of Community law. Therefore in order to safeguard the dialectic of autonomy-uniformity³⁹ the exercise of the national competence for the application and enforcement of Community law has been orientated by the wording of Article 10 EC, which imposes on Member States two general duties and one general prohibition. Article 10 EC applies to all national authorities and courts and obliges the national courts, when dealing with national law, which may be contrary to Community law, to act as part of the Community legal order. Through the wording of Article 10 EC Member States are bound to take all measures, which are necessary for the implementation of Community rules and the full effectiveness of Community law⁴⁰. This obligation includes the obligation of Member States to repeal or amend all national rules, which are contrary to Community legislation. National courts must give full protection to all provisions, with or without direct effect, set aside⁴¹ national rules preventing Community rules from having full force and provide all appropriate remedies and procedures to ensure full legal protection of the rights deriving from Community law⁴². Article 10 EC obliges Member States to respect fundamental rights rules and all general principles of law, especially when national courts are dealing with Community measures as Community judges. It is clear that the European Court of Justice has been using Article 10 EC in order to set out a number of duties to Member States for the full protection of Community law⁴³. It is therefore for the national authorities to follow this guidance and contribute to the development of the principle of full effectiveness of rights deriving from Community rules⁴⁴.

³⁹ D. Simon, *Le système juridique communautaire*, Presses Universitaires de France, 1998, p. 103.

⁴⁰ Case 30/70 *Scheer v. Einfuhr-und-Vorrassstelle Getreide* [1970] ECR 1197, Case 137/80 *Commission v. Belgium* [1981] ECR 2393, Joined Cases 205-215/82 *Deutsche Milchkontor GmbH v. Germany* [1983] ECR 2633, Case 239/85 *Commission v. Belgium* [1986] ECR 3645

⁴¹ Case C-213/89 *R. v. Secretary of State for Transport*, ex. p. *Factortame* [1991] ECR I-2433

⁴² Case 33/76 *Rewe v. Landwirtschaftskammer Saarland* [1976] ECR 1989, Case 102/81 *Nordsee Deutsche Hochseefischerei* [1982] ECR 110

⁴³ For further analysis see: Constantinesco, *L'article CEE de la bonne foi à la loyauté communautaire*, in Capotorti and others (eds.), *Du Droit International au droit de l'intégration: Liber Amicorum pierre Pescatore* (1987), p. 97; J. Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, (1990) 27 CML Rev., p. 645.

⁴⁴ For a detailed analysis of Article 10 EC Treaty see J. Temple Lang, *The Duties of National Authorities Under Community Constitutional Law*, (1998) 23 EL Rev., p. 109-131; J. Temple Lang, *The duties of cooperation of national authorities and Courts under Article 10 E.C.: two more reflections*, (2001) 26 EL Rev., p. 84-93

III.5) The role of the European Courts to settle the issue of the effective protection of individuals' EC rights before national courts

The European Court of Justice has played an important part in the development of the effective protection of Community rights of individuals before national courts⁴⁵. For the purpose of the analysis of the remarkable case law of the Court, it should be emphasised that the European Court of Justice has passed through three different phases of case-law when dealing with the protection of individuals⁴⁶. Initially, as mentioned at the first section of this chapter, the Court's judgments were based on the principle of direct effect and supremacy in order to guarantee the Community protection of rights conferred to individuals and the autonomy of the Community legal order. During the second phase the focus was directed towards the national procedural law and the remedies for breach of directly effective Community measures. The second-generation case law shows the minimal interference of the Court in the autonomy of national courts to apply their own remedies in cases dealing with the protection of Community rights of individuals. Finally, what can be referred to as the third generation case law, one sees the Court of Justice striving to introduce a solution to the problem of effective national remedies for the protection of Community rights of individuals. Its underlying approach is to achieve essential solutions for the lack of *effet utile* of direct effect in the absence of adequate and effective national enforcement measures of Community law rights⁴⁷. Therefore it is essential to examine the Court's interpretation when responding to the problems concerning the protection of Community rights before national jurisdictions.

III.5.A) *The second generation case-law*

Early enough the European Court of Justice has established that the rights of individuals deriving from Community law should be protected before national courts

⁴⁵ For an analysis of the role of the Court of Justice in the Community legal order see K. Boskovits, *Le juge communautaire et l'articulation des compétences normatives entre la Communauté européenne et ses Etats membres*, Sakkoulas/Bruylant, Athens-Bruxelles, 1999; K. Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians in the European Community*, (1992) 12 YEL, p. 1-34

⁴⁶ See C. Kilpatrick, *Turning Remedies Around: A Sectoral Analysis of the Court of Justice*, in *The European Court of Justice*, edited by G. De Búrca and J.H.H. Weiler, Oxford University Press, p. 143-176. Kilpatrick deals with the effective protection of individuals' rights in a sectoral approach, by analysing the gender equality cases.

⁴⁷ D.O'Keeffe, *supra* n° 2, p. 76

and it was for the national legal systems to determine how these rights were to be protected. In *Rewe*⁴⁸ the Court ruled that according to the principle of co-operation laid down in Article 10 (ex Art. 5) EC, it is for the national courts to ensure the legal protection which citizens derive from the direct effect of Community provisions. Where there are no Community rules concerning the protection of Community rights before national courts, the Court held that it is for the domestic law to designate the courts' jurisdiction and to ordain the procedural conditions governing actions at law intended to ensure those rights. The Court of Justice mainly followed the Opinion of Advocate General Warner, but in order to establish the principle of national procedural autonomy it added two additional conditions. Firstly, the Court referred to the principle of equivalence. According to this principle of non-discrimination, all remedies and actions available under national law to ensure protection of Community rights cannot be less favourable than those available for the protection of rights of a domestic nature. Secondly, the Court imposed the principle of effectiveness, or principle of practical possibility⁴⁹, which provides that the procedural conditions determined by the national law should not make it impossible in practice to exercise the rights that national courts have the obligation to protect⁵⁰. It is therefore not sufficient just to apply Community law rules in a similar way as national rules but further to provide remedies which are effective for the protection of Community rights. Through the case law of the Court minimum standards for the judicial protection of Community rights before national authorities have been imposed. Those principles were confirmed in *Comet*⁵¹, which was decided the same day as *Rewe*.

The minimalist guidelines adopted by the European Court of Justice in the latter cases were repeated in several other cases. In *Just*⁵² as well as in *Mireco*,⁵³ and *Denkavit*⁵⁴ the Court supported the national rule prohibiting unjust enrichment of traders who sought the recovery of duty paid which the Court had already ruled to be incompatible with Community law. The Court held that there was nothing "to prevent national courts from taking account, in accordance with their national law of the fact

⁴⁸ Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989

⁴⁹ P. Craig and G de Búrca, *EU LAW: Text, Cases and Materials*, Oxford University Press, 2003, p. 233

⁵⁰ E. Werlauff, *Common European Procedural Law*, PJØF Publishing Copenhagen, 1999, p. 30

⁵¹ Case 45/76 *Comet v. Produktschap voor Siergewassen* [1976] ECR 2043

⁵² Case 68/79 *Hans Just I/S v. Danish Ministry for Fiscal Affairs* [1980] ECR 501

⁵³ Case 826/79 *Mireco* [1980] ECR 2559

⁵⁴ Case 61/79 *Denkavit Italiana* [1980] ECR 1205

that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchasers”, as long as Community law did not require an order to be granted for the recovery of those charges illegally imposed. In *Express Dairy Foods*⁵⁵ concerning the reimbursement of charges, the Court held that national courts were responsible for settling the question for the payment of interest by applying their national rules regarding the rate of the interest and the date from which the interest can be calculated.

The primary concern of the European Court of Justice at this stage was to make clear that the issue of procedures and remedies was for the Member States, whose autonomy is limited by the principles that the Court has determined. It was in *Butterboots*⁵⁶ that the European Court of Justice established the principle that there is no obligation of Member States to create new remedies. The main issue was over who had the right to invoke a breach of Community law before national Courts. The Court replied that the Treaty did not intend to create new remedies in the national jurisdictions for the protection of Community rights of individuals other than those already existing by national law. However the Court ruled that all remedies and actions of domestic law should be available for the observance of Community law, based on the same procedural conditions as if the observance of national law were in question. Therefore in the absence of harmonising procedural measures Member States can apply their own procedural rules to grant remedies for the protection of Community rights, without being obliged to create new remedies, although being required to apply the principles of equivalence and effectiveness.

As for the right of individuals to damages in a case of liability of a Member State for breach of Community law, the Court applied the guidelines of its second-generation case law and ruled in *Russo*⁵⁷ that it was for the national court to decide on the basis of each case whether an individual has suffered damage by an infringement of Community law by the Member State. If damage has occurred the Member State is liable to the injured individual for the consequences, in the context of national provisions on the liability of the State. The Court followed the early guidance of *Rewe* and *Comet* and suggested that national principles on State liability should dominate for the protection of the individuals in a case of an infringement of Community law.

⁵⁵ Case 130/79 *Express Dairy Foods* [1980] ECR 1887

⁵⁶ Case 158/80 *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel* [1981] ECR 1805

⁵⁷ Case 60/75 *Russo v. AIMA* [1976] ECR 45

These cases demonstrate the assumption by the Court of Justice that national rules would be applicable in a case concerning an effective remedy for the protection of Community rights of individuals. It has worked consistently to establish the principle of national procedural autonomy and to give national jurisdictions the power to apply their own procedural rules when dealing with protection of Community rights before their courts. However, this autonomy has not been absolute. The European Court of Justice has set out conditions in order to orientate the effective application and protection of Community rights. The Court has tried at this stage to stress the need for Community legislation⁵⁸, but such call has not been taken up. It is obvious that, in applying those principles before national jurisdictions, uniformity of Community law cannot be taken for granted. Each Member State can still apply its own procedural law and can consequently provide different degrees of adequacy, or even effectiveness, for the protection of Community rights than another Member State.

Through this second generation case-law the Court wanted to make it clear that there was an exclusive division of responsibilities: the Court would establish the direct effect of Community provisions and the national courts would apply these provisions according to their own procedural rules⁵⁹. Advocate General Warner showed the Court's approach concerning the position of the individual before the national courts. In *Rewe* he stated that although individuals could rely on a prohibition deriving from Community law on the part of a Member State before the national court, the absence of any remedies and procedures deriving from Community law for that purpose gave no alternative to the application of national rules on remedies and procedures⁶⁰.

The modification of such an interpretation did not come late. In a number of cases the Court was concerned with the efficacy of the national remedies and procedures available for the effective protection of individuals' rights. In *San Giorgio*⁶¹ the Court set aside a national rule of evidence which required excessive

⁵⁸ In Case 130/79 *Express Dairy Foods* [1980] ECR 1887 the Court ruled "in the regrettable absence of Community provisions harmonising procedure and time limits the Court finds that the situation entails differences of treatment on a Community scale. It is not for the Court to issue general rules of substance or procedural provisions which only the competent institutions may adopt."

⁵⁹ R. Craufurd Smith, *Remedies for Breach of EC Law in National Courts: Legal variation and Selection*, in *The Evolution of EU Law*, edited by P. Craig and G. De Búrca, p. 294

⁶⁰ Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, p. 2003

⁶¹ Case 199/82 *Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] ER 3595

documentary proof from the individual in order to enforce his Community rights. It ruled that “any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law”.

A more significant case, which demonstrates the change of the ECJ’s attitude towards the protection of individuals before national courts, is *Von Colson*⁶² dealing with Article 6 of Directive 76/207 on equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions⁶³. First, the Court declared that Member States were required to take all appropriate measures in order to achieve the objective of the Directive and to ensure that the individuals concerned can make use of those measures before the national courts. The Court then ruled that although no specific form of sanction for unlawful discrimination is required for the implementation of the Directive, the sanction should be such as to ensure real and effective judicial protection. Therefore “it appears that national provisions limiting the right to compensation of persons who have been discriminated against as regards access to employment to a purely nominal amount would not satisfy the requirements of an effective transposition of the directive”. Secondly, for the first time the Court held that national courts were under the duty to interpret domestic law in the light of the requirements of the Directive, irrespective of a requirement of direct effect (principle of sympathetic interpretation). Through an extensive interpretation of Article 10 EC Treaty the Court imposed this obligation on national courts in order to promote the protection of individuals, even where no directly effective provisions were available to provide an adequate remedy⁶⁴.

The issue of effective protection of rights deriving from the Directive 76/207 was also emphasised in *Johnston*⁶⁵. The Court confirmed what was previously held regarding the purpose of Article 6 of the directive and declared that national measures like Article 53(2) of the Sex Discrimination Order do not assert that the rights

⁶² Case 14/83 *Von Colson and Kamann v. land Nordrhein-Westfalen* [1984] ECR 1891

⁶³ OJ 1976 L39/40. Article 6 provides that “Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.”

⁶⁴ D.O’Keeffe, *supra* n° 2, p. 77; See Case 79/83 *Dori Harz* [1984] ECR I-1921, Case C-177/88 *Dekker v. VJV* [1990] ECR I-3941, Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, Case C-91/92 *Dori v. Recreb Srl* [1994] ECR I-3325, Case C-168/95 *Arcaro* [1996] ECR I-4705, Case C-180/95 *Nils Draehmpaehl v. Urania Immobilienservice ohG* [1997] ECR I-2195, Case C-185/97 *Coote v. Granada Hospitality* [1998] ECR I-5199

⁶⁵ Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651

conferred by the directive can be protected by judicial process. Therefore the Court held that this provision is contrary to the principle of effective judicial control laid down in Article 6 of the directive⁶⁶. In *Johnston* the Court ruled that the requirement of judicial protection laid down by Article 6 of the directive reflects a general principle of law, which is also laid down by Articles 6 and 13 of ECHR. Therefore, this case demonstrated that the requirement of judicial control is apparent and should exist in all Community measures which confer rights on individuals⁶⁷. This ruling was confirmed in *Heylens*⁶⁸ where the Court argued on the absence of a statement of reasons for a decision of a national authority refusing free access to employment of an individual of another Member State. It ruled that in order to ensure effective protection of an individual's right, each right should contain a remedy against any decision of a national administrative authority refusing the benefit of that right⁶⁹. The judgments referring to the right of effective judicial protection of individuals were also repeated in *Verholen and Others*⁷⁰, where the Court ruled that: while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right of effective judicial protection and the application of national legislation cannot render virtually impossible the exercise of the rights conferred by Community law". The Court drew on the right to effective judicial protection and pointed out that the right to rely on Directive 79/7 could be extended to any individual who had 'a direct interest in ensuring that the principle of non-discrimination is respected as regards persons who are protected'⁷¹.

⁶⁶ The Court dealt with Article 6 of Directive 76/207 in Case C-271/91 *Marshall II*. It held that "full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment." The Court made clear that national limits on compensatory awards should not be applied in so far as they impede an effective remedy.

⁶⁷ J. Schwarze, *The Procedural Guarantees in the Recent Case-Law of the European Court of Justice, in Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers, Volume II*, edited by D. Curtin and T. Heukels, Martinus Nijhoff Publishers, p. 488

⁶⁸ Case 222/86 *UNECTEF v. Heylens* [1987] ECR 4097

⁶⁹ J. Schwarze, *Tendencies towards a Common Administrative Law in Europe*, (1991) 16 EL Rev., p.

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⁷⁰ Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and Others* [1991] ECR I-3757

⁷¹ *Ibid.*, para 23

III.5.B) *The third generation case law*

There are cases which show the Court's concern to take a more intrusive approach in order to protect the right for effective judicial protection of rights that individuals confer by Community law. In *Emmott*⁷² concerning national time limits, the Court was asked whether an individual could be prevented from relying before the national courts on a Directive, which was not correctly transposed, on the ground that the limitation period provided by national law had expired. The Court held that Member States were required to ensure full application and effectiveness of Directives so that all individuals could rely on the rights deriving from the Directives. The Court concluded that "Community law precludes the competent authorities of a Member State from relying, in proceedings brought against them by an individual before the national courts in order to protect rights directly conferred upon him by a directive, on national procedural rules relating to time-limits for bringing proceedings so long as that Member State has not properly transposed that directive into its domestic legal system". The *Emmott* ruling obviously brought with it important ramifications flowing from a Member State's failure to properly implement a Directive⁷³. That meant that all individuals' rights could be challenged pursuant to an unimplemented Directive, even if the claims were brought many years after the relevant damage had occurred.

The judgment of the European Court of Justice in *Factortame*⁷⁴ illustrates its interventionist approach towards the full effectiveness of Community law before national jurisdictions⁷⁵. The Court had to deal with the issue of interim relief. As the whole system of interim protection is going to be analysed below, suffice at this point to mention the fundamental parts of the judgment dealing with the effective protection of Community rights⁷⁶. The Court was asked to deal with the matter of whether, and under what conditions, a national court can grant interim relief pending the outcome

⁷² Case C-208/90 *Emmott v. Minister for Social Welfare* [1991] ECR I-4269

⁷³ A. Ward, *Judicial Review and the Rights of Private Parties in EC Law*, Oxford University Press, 2000, p. 37

⁷⁴ Case C-213/89 *R v. Secretary of State of Transport, ex parte Factortame* [1990] ECR I-2433

⁷⁵ See also D. Curtin, *The Decentralised Enforcement of Community Law Rights. Judicial Snakes and Ladders*, in *Constitutional Adjudication in European Community and National Law*, edited by D. Curtin and D. O'Keeffe, Butterworths, 1992, p. 42

⁷⁶ For an outline of the fundamental issues of the *Factortame* and *Zuckerfabrik* judgments see also: P. Oliver, *Le droit communautaire et les voies de recours nationales*, (1992) C.D.E., p. 348-374; N.P. Gravells, *Disapplying an Act of Parliament pending a Preliminary Ruling: Constitutional Enormity or Community Right?* (1989) Public Law, p. 180-191;

of the ruling of the Court of Justice under the proceedings of Article 234 (ex Art. 177) EC. In order to answer the question the Court stressed the importance of *Simmenthal*⁷⁷ and ruled that directly applicable rules “must be fully and uniformly applied in all Member States from the date of their entry into force and for so long as they continue in force”. It went on to confirm what had been previously ruled that national courts, according to the principle of co-operation laid down in Article 10 (ex Art. 5) EC, are under the duty to ensure the legal protection of rights which individuals derive from the direct effect of Community law. This means that national courts have the power, when applying any national provision, to do everything necessary to set aside any national measure, which might prevent, even temporarily, the full effectiveness of Community rules. Therefore, the Court concluded that “Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.”

The Court had to deal with the issue of interim relief in *Zuckerfabrik*⁷⁸ too. Here the situation was different, since the question was whether a national court could suspend the application of a Community regulation pending a ruling of the European Court of Justice on the validity of the Community measure. The European Court of Justice held: “In cases where national authorities are responsible for the administrative application of Community regulations, the legal protection guaranteed by Community law includes the right of individuals to challenge, as a preliminary issue, the legality of such regulations before national courts and to induce those courts to refer questions to the Court of Justice for a preliminary ruling. That right would be compromised if, pending delivery of a judgment of the Court, which alone has jurisdiction to declare that a Community regulation is invalid, individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of enforcement which would make it possible for the effects of the disputed regulation to be rendered for the time being inoperative as regards them.” As to the matter of under which conditions such interim relief can be granted, the European Court of Justice held that these conditions are governed by national procedural rules, which differ according to Member States, and may jeopardise the

⁷⁷ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A* [1978] ECR 629

⁷⁸ Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Suderithmarschen v. HZA Itzehoe and Zuckerfabrik Soest v. HZA Paderborn* [1991] ECR I-415

uniform application of Community law. Therefore the European Court of Justice ruled that national courts “may grant such relief only on the conditions which must be satisfied for the Court of Justice to allow an application to it for interim measures” under Article 242 and 243 (ex Arts. 185 and 186) EC.

The question of whether national courts should ensure the right of effective protection of Community rights conferred on individuals arose in the case of *Francovich and Others*⁷⁹ concerning the failure of Italy to implement the Directive 80/987 on the protection of employees in the event of the insolvency of their employer. The Court confirmed that the Treaty conferred rights, not only to Member States, but also to their nationals. And therefore the national courts had the duty to ensure that those rights of individuals deriving from Community law were protected. It ruled that “the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible. It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.” The Court went on to consider the conditions for State liability and ruled that these conditions were sufficient to give rise to a right to individuals to obtain reparation, a right, which was founded directly on Community law. Referring to *Rewe*⁸⁰ the Court repeated that “it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused”, but that the principles of equivalence and effectiveness should be applied and respected. The importance of the judgment is clear. The Court went on to establish State liability as a principle of the Community legal order governing the effective judicial protection of individuals at a national level. The Court made an important contribution concerning the relationship between Community law and national jurisdictions, even in cases where the direct effect of Community provisions is lacking⁸¹. In other words, the Court opened up a significant new

⁷⁹ Joined Cases C-6/90 and C-9/90 *Francovich and Others v. Italian State* [1991] ECR I-5357

⁸⁰ Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989

⁸¹ The case law after *Francovich*: Case C-91/92, *Faccini Dori v. Recreb* [1994] ECR I-3325, Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, Case C-5/94 *The Queen v. MAFF, ex parte Hedley Lomas* [1996] ECR I-2553, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others v. Federal Republic of Germany* [1996]

constitutional frontier by ruling that even if a Directive was not clear, unconditional and precise, individuals were entitled, in some circumstances, to payment of compensation from Member States which have failed to transpose the Directive's substantive terms⁸².

However, the cases which will follow demonstrate the willingness of the Court to re-establish the principle of national procedural autonomy and to show commitment to the principles of equivalence and effectiveness as the most appropriate basis for the effective protection of Community rights of individuals at a national level. In *Steenhorst-Neerings*⁸³ the Court was asked whether Community law precluded the application of a national provision, according to which benefit was payable no earlier than one year before the date of the claim. The Court took a different view⁸⁴ from *Emmott* and ruled that the provision in the present case did not affect the right of the interested party to rely on the Directive, and therefore it merely limited the retroactive effect of the claim. Consequently, the Court held that the period for which benefits are payable may be limited to one year before the date of the claim, where the competent Member State has not implemented the Directive in national law. The Court confirmed its judgment in *Johnson*⁸⁵, where it concluded that "the national rule, which adversely affects Mrs Johnson's action before the Court of Appeal, is similar to that at issue in *Steenhorst-Neerings*. Neither constitutes a bar to proceedings; they merely limit the period prior to the bringing of the claim in respect

ECR I-4845, Case C-392/93 *R v. HM Treasury, ex parte British Telecommunications* [1996] ECR I-1631, Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit Internationaal and Others v. Bundesamt für Finanzen* [1996] Joined Cases C-192/95 to C-218/95 *Comateb and Others v. Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165, Case C-127/95 *Norbrook Laboratories Limited v. Ministry of Agriculture* [1998] ECR I-1531, Case C-319/96 *Brinkmann Tabakfabriken GmbH v. Skatteminiseriet* [1998] ECR I-5255, Case C-302/97 *Konle v. Republic of Austria* [1999] ECR I-3099, Case C-321/97 *Ulla-Brith Andersson and Susanne Wakeras-Andersson v. Swedish State* [1999] ECR I-3551, Case C-140/97 *Rechberger and Greindl v. Austria* [1999] ECR I-3499, Case C-424/97 *Salomone Haim v. Kassenzahnärztliche Vereinigung Nordrhein (Haim II)* [2000] ECR I-5123, Case C-150/99 *Svenska Staten v. Stockholm Lindopark AB*, [2001] ECR I-493

⁸² A. Ward, *More than an "Infant Disease": Individual Rights, EC Directives, and the Case for Uniform Remedies*, in *Direct Effect Rethinking a Classic of the EC legal Doctrine*, edited by J.M. Prinssen and A. Schrauwen, Europa Law Publishing, 2002, p. 46

⁸³ Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475; See I. Higgins, *Equal Treatment and national procedural rules: one step forward, two step back*, *Irish Journal of European Law*, 1995, Vol. 4, p. 18-29

⁸⁴ M. Hoskins, *Titling the Balance: Supremacy and National Procedural Rules*, (1996) 21 *EL Rev.*, p. 371. The Court of Justice distinguished its approach it took in *Emmott* Case and confirmed that it had to come to this conclusion because of the particular circumstances of that case: Case C-212/94 *FMC and Others* [1996] ECR I-389, Case C-90/94 *Haahr Petroleum v. Abenra Havn and Others* [1997] ECR I-4085, Joined Cases C-114/95 and C-115/95 *Texaco and Olieselskabet Danmark* [1997] ECR I-4263

⁸⁵ Case C-410/92 *Johnson* [1994] ECR I-5483

of which arrears of benefit are payable.” In the same vein in *Fantask*⁸⁶ the Court ruled that in a case involving a claim for recovery of levies, a Member State, which has not implemented a Directive, can rely on a five year limitation period starting from the date on which the charges became payable. The Court also referred to the *Rewe* and *Comet* and concluded that the existence of time-limits for bringing claims before national courts was compatible with Community law and promoted legal certainty, as long as the principles of equivalence and effectiveness were satisfied. In other words, national time-limits were lawful, provided that they do not deprive individuals of “any opportunity whatever” to enforce rights deriving from the Directives. In *Edis*⁸⁷ the Court ruled that Community law did not prevent a Member State from relying on a time limit running from the date of payment of the charges in question, even if the Directive had not been properly transposed into national law on that date.

The European Court of Justice emphasised the importance of national procedural rules in *Van Schijndel*⁸⁸, a case concerning the power of a national court to raise points of Community law of its own motion. The Court applied the principles of national procedural autonomy and concluded that “each case, which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.” In the absence of Community legislation the requirement for national courts to raise Community rules of their own motion will exist, only if such requirement is provided by domestic law. Therefore, the Court concluded that a national provision, which does not satisfy the conditions laid down by Community law must be set aside, and consequently the national court may still be obliged to raise rules of Community law of its own motion⁸⁹.

⁸⁶ Case C-188/95 *Fantask and Others v. Industriministeriet* [1997] ECR I-6783

⁸⁷ Case C-231/96 *Edis v. Ministero delle Finanze* [1998] ECR I-4997

⁸⁸ Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen v. SPF* [1995] ECR I-4705

⁸⁹ See also case C-312/93 *Peterbroeck v. Belgian State* [1995] ECR I-4599. The Court arrived at a different result from *Van Schijndel*. Advocate General Jacobs proposed a similar solution but the court ruled that the procedural rule in question was interfering with the functioning of the preliminary procedure and therefore was incompatible with Community law. See G. Canivet and J-G. Huglo, *L'obligation pour le juge judiciaire national d'appliquer d'office le droit communautaire au regard des arrêts Jeroen Van Schijndel et Peterbroeck*, *Europe (Revue mensuelle)* 1996, No 4, p. 1-14

Another illustration of the Court's new approach towards the principle of national procedural autonomy is provided in *The Queen v. Secretary of State for Social Security, ex p. Sutton Case*⁹⁰, which concerned the payment of interest based on Directive 79/7 on equal treatment for men and women in matters of social security. The national legislation did not provide any provision for such payment, but Article 6 of the directive did. The Court ruled that as long as the principle of equivalence was satisfied the absence of a right to interest under national law couldn't be considered to make the enforcement of rights of individuals deriving from Community law excessively difficult. The Court concluded that it was a matter of national law whether the individual applicant was entitled for reparation for the loss he/she claimed as a result of the breach of Community law by the Member State in question. Surprisingly, The Court made no reference to the obligation of Member States to provide an effective, proportionate and dissuasive remedy to protect individual rights⁹¹. It is noteworthy that the Court could have done so based on the principle that national authorities have the duty to fill breaches in the range of sanctions in order to secure the effective protection of individual rights deriving from Community law⁹². Finally, in *Comateb*⁹³ the Court had to deal with the question of whether a trader could recover from the State a tax, contrary to Community law, when that tax has been passed on and borne by another person. The Court ruled that "where domestic law permits the trader to plead such damage in the main proceedings, it is for the national court to give such effect to the claim as may be appropriate". It also recognised that "traders may not be prevented from applying to the courts having jurisdiction, in accordance with the appropriate procedures of national law, and subject to the conditions laid down in ... *Brasserie du Pêcheur* and *Factortame* ... for reparation of loss caused by the levying of charges not due, irrespective of whether those charges have been passed on."

As regards the locus standi of private parties before national courts to challenge Community measures the Court had the opportunity to pronounce, confirming its

⁹⁰ Case C-66/95 *The Queen v. Secretary of State for Social Security, ex parte Sutton* [1997] ECR I-2163

⁹¹ Case 68/88 *Commission v. Greece* [1989] ECR 2965, para. 24

⁹² A. Ward, *Judicial Review and the Rights of Private Parties in EC Law*, Oxford University Press, 2000, p. 124

⁹³ Joined Cases C-192/95 to C-218/95 *Comateb and Others v. Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165

judgment in *Verholen*⁹⁴ that it is for national law to provide the rules for locus standi to individual applicants subject to the limitations of the principles of equivalence and effectiveness. In particular in *Safalero Srl*⁹⁵ the Court had to answer the referred question as to whether a national rule prohibiting a person directly and individually concerned by a measure adopted by the administrative authorities to institute proceedings where the measure itself is addressed to other persons, was compatible with the principle of effective legal protection of Community rights. The Court repeated that it was for the national legal systems to designate the courts and to lay down the procedural rules governing actions for safeguarding Community rights. The only restriction, according to the Court was that national legislation should not undermine the right of effective judicial protection. Although the Court confirmed its approach on the issues of national rules on locus standi, it considered necessary to make a further examination as to whether there was an available legal remedy which ensured the effective judicial protection of the Community rights conferred to the specific individual applicant. It seemed to the Court that the essential element of the case was not the determination of which law would provide the locus standi rules, but how would the private applicant secure an effective remedy for his Community rights. The court ruled that the applicant's interest was sufficiently protected according to national procedural rules and held that national rules precluding an individual from bringing an action against an administrative measure, which is not addressed to him, is compatible with the principle of effective protection, as long as this individual has other available legal remedies under national law which ensure respect of the rights conferred to him by Community law. This case illustrates the Court's need to focus on the real essence of this tough debate between national procedural rules and Community law, which is the effective protection of individuals. It seems that if the national rules on locus standi might seem to be strict, the Court is willing to respect them as long as the interested party has available remedies for his Community rights.

The Court's approach to focus on the principle of effective protection of Community rights was pronounced in *Muñoz*⁹⁶, where the case was about the right of a private applicant- producer- to effectively protect before national courts his rights

⁹⁴ Joined Cases C-87 to C-89/90 *Verholen and Others v. Sociale Verzekeringsbank Amsterdam* [1991] ECR I-3757

⁹⁵ Case -13/01 *Safalero Srl v. Prefetto di Genova* [2003] ECR I-8679

⁹⁶ Case C-253/00 *Antonio Muñoz y Cia, Superior Fuiticola v. Frumar Ltd, Redbridge Produce Marketing Ltd* [2002] ECR I-7289

deriving from an EC Regulation – Regulation 2200/96 on the common organization of the market of fruit and vegetables. The Court of Appeal referred a question to the ECJ asking whether the relevant Regulation could be enforced by national courts in civil proceedings when an action is brought by a private applicant against another individual party. The Court repeated that Regulations were designed to confer rights to individuals, which national courts have the duty to protect effectively. It went on to analyse the purpose of the relevant Regulation and concluded that the practical effect of the measure implied that it was possible to enforce it in proceedings between a trader and his competitor. The judgment incorporates important issues on the nature of Regulations and on the possible private enforcement of these measures before national courts. It is interesting though, in the context of this analysis, to examine the Court's approach on the possible application of national procedural rules when such enforcement can take place. It is established that national rules are going to apply in order to make sure that rights deriving from a Regulation are effectively protected. However these rules are subject to the limitations imposed by the ECJ. In *Muñoz* the Court remained silent on the issue of national procedural autonomy. It seems that the Court did not deal with the compatibility of any national procedural rule, but instead it focused on the genuine aims of the relevant Regulations, in order to justify the right of the applicant to invoke such measures. It can be argued that the silence of the Court on the issue of national procedural competence is based on the fact that there is a well-established principle providing that national procedural rules will determine the right of action brought by an individual based on a regulation⁹⁷. The Court's aim was to stress that only individuals who had a specific interest arising from the relevant regulation could rely on that measure against another party, provided that the national procedural conditions are satisfied. It seems to be clear from this judgment that the procedural conditions, and in particular *locus standi*, are provided by national law, which needs however to be compatible with the principle of effective protection of Community rights. The ECJ used that principle in order to create a powerful weapon for individual applicants to enforce EC Regulations before national courts⁹⁸. Through this judgment the Court tried to safeguard the quality of rights deriving from

⁹⁷ A. Biondi, note on Case C-253/00, *Antonio Muñoz y Cia, Superior Fruiticola SA v. Frumar Ltd, Redbridge Produce Marketing Ltd*, Judgment of the Full Court of 17 September 2002, [ECR] 2002 I-7289, 40 CML Rev, p. 1241-1250, at 1249

⁹⁸ *Op.*, cit., p. 1250

Community law and focused on defining the subjective rights of the relevant Regulation.

Finally, there are cases which show the Court's tendency to declare some national procedural rules incompatible with Community law. In *Magorrian*⁹⁹ the Court of Justice was asked where Community law prevents the application of a national provision which impeded a woman in an equal pay case from recovering any money in respect of the period earlier than two years before the date on which proceedings were brought. The Court ruled that such a provision hindered the enforcement of rights conferred on individuals by Community law, and that it was incompatible with the principle of effectiveness¹⁰⁰. The same rule was also dealt with in *Levez*¹⁰¹, where a national time limit prevented the applicant from claiming payment for the first seven months during which she had the job. The Court ruled that "application of the rule at issue is likely, in the circumstances of the present case, to make virtually impossible or excessively difficult to obtain arrears of remuneration in respect of sex discrimination. It is plain that the ultimate effect of this rule would be to facilitate the breach of Community law by an employer whose deceit caused the employee's delay in bringing proceedings for the enforcement of the principle of equal pay."

The third generation case law bears witness to the Court developing a new cause of action in Community Law and has changed national rules dealing with remedies and procedure. The Court interfered with the national procedural rules and took a step further in the context of positive obligation of national authorities by adopting appropriate measures in order to protect individual Community rights. The third generation case law witnesses the Court's intention to ensure the enforcement of individuals' Community rights before national courts. It is not without importance that, in these cases, the Court makes no reference to its previous judgments on the procedural autonomy of Member States. In contrast it seems to have cast aside these limiting conditions, and has chosen a more vigorous and assertive role for Community Law, even in the absence of harmonising provisions¹⁰². However it is not surprising that, although the Court's main preoccupation was the effectiveness of remedies

⁹⁹ Case C-246/96 *Magorrian and Cunningham v. Eastern Health and Social Services Board and Department of Health and Social Services* [1997] ECR I-7153

¹⁰⁰ See Case C-185/97 *Coote v. Granada Hospitality Ltd* [1998]

¹⁰¹ Case C-326/96, *Levez v. Jennings Harlow Pools Ltd* [1998]

¹⁰² D. Curtin and K. Mortelmans, *supra* n° 7, p. 453

provided to individuals for the protection for their Community rights, the third generation case law is neither coherent nor linear. The recent judgments have shown that the Court has taken a more restrictive approach retreating to the national procedural rules, due to the criticism by Member States of the Court's activism. Therefore, it remains to be seen how the Court and the Community legislator will effectively protect the individual against any infringement of Community Law by the Member States.

III.6) Restrain or judicial activism?

The examination of the Court's approach shows the difficulties inherent in the task of balancing the principle of effectiveness of Community law with national procedural autonomy. However, the Court has made efforts to find a co-operative way in order to safeguard the effectiveness of community law as well as protect the Community interests.

On the one hand, there are opinions expressed which find the Court's approach effective enough for eliminating the tension between national procedural rules and the principle of effective protection of Community rights before national jurisdictions¹⁰³. In the absence of Community legislation on this matter, it has been expressed that total unanimity of expression and of application of Community law is not fundamental. What is needed is to base the whole situation on a general principle even if it is provided in general terms. The accusation that the European Court of Justice is judicially activist is overruled and, according to academics, is unfounded¹⁰⁴. As long as general principles are not clearly provided for in the Treaty, it is for the European Courts to develop them. More specifically, through *Factortame* and *Francovich* the Court was accused of being activist. However, as Anthony Arnall expressed: "Both decisions were natural, perhaps even overdue, developments of the twin doctrines of primacy and direct effect. Those doctrines are indispensable to the uniform application of EC law, without which the internal market could not function. For that reason they may themselves be considered implicit in the system created by the EC

¹⁰³ See also T. Tridimas, *The Court of Justice and Judicial Activism*, (1996) 21 EL Rev., p. 199-210

¹⁰⁴ J. Temple Lang, *The Principle of Effective Protection of Community law Rights*, in *Judicial review in European Union Law*, edited by D. O'Keeffe and A. Bavasso, Volume I, Kluwer Law International, 2002, p. 270

Treaty”¹⁰⁵. Proper application of Community law does not mean that there should be no limitations. The authors of the Treaty had no other choice but to rely on the national judicial system to ensure this kind of application. However the silence of the Treaty does not preclude the court from having a role in this area. For that reason the Court of Justice has adopted this approach and has incorporated the principles of effectiveness and the principle of equivalence. It has been argued¹⁰⁶ that, in all cases, the essential issue for the Court was the same, namely to achieving the appropriate balance. Still the *Francovich* judgment as well as the *Emmott* and *Factortame* rulings are “courageous” attempts by the European Court of Justice to provide individuals with a remedy that could lead to the effective restitution of their damages caused by the illegal act or omission of the relevant Member State¹⁰⁷.

On the other hand, the Court’s judgments concerning the enforcement and protection of Community rights before national courts has been criticised as being too intrusive into national legal orders. The Court of Justice has dealt with a national procedural rule under the specific circumstances of each case. It is therefore questionable whether the task of the European Courts is to get so involved with such rules and give judgment on behalf of the national courts. These *ad hoc* decisions, based on the principles of effectiveness and non-discrimination have not facilitated the role of national courts. On the contrary, preliminary references have been increased, even in cases where the applicability of Community law was clear. The judgments analysed may seem to have a positive effect of clarifying to national jurisdictions how national procedural rules should be applied before national courts in order to be compatible with Community law. However, this approach still makes the Court’s life “tougher”¹⁰⁸ since domestic rules have to be stringently analysed. This piecemeal approach of the Court of Justice raises questions as to which other remedies should be available to the plaintiff and as to how far will, and should, the Court of Justice go in order to form specific types of redress based on the facts of

¹⁰⁵ An. Arnall, *Rights and Remedies: Restraint or Activism?*, in *Remedies for Breach of EC Law*, edited by J. Lonbay and An. Biondi, John Wiley and Sons, 1997, p. 15

¹⁰⁶ F. G. Jacobs QC, *Enforcing Community Rights and Obligations in National Courts: Striking the Balance*, in *Remedies for Breach of EC Law*, edited by J. Lonbay and An. Biondi, John Wiley and Sons, 1997, p. 25

¹⁰⁷ C. Stefanou and H. Xanthaki, *Are national Remedies the Only Way Forward? Widening the Scope of Article 215(2) of the Treaty of Rome*, in *Remedies for Breach of EC Law*, edited by J. Lonbay and An. Biondi, John Wiley and Sons, 1997, p. 85.

¹⁰⁸ An. Biondi, *The European Court of Justice and Certain National Procedural Limitations: Not Such a Tough Relationship*, (1999) 36 CML Rev., p. 1284.

each particular case brought before it. It is still uncertain whether the requirement of effectiveness of Community law is regarded from the point of view of the individual concerned, or from the point of view of protecting the Community interest¹⁰⁹. A reasonable solution would be to leave the question of the compatibility of national procedural law to the national courts and to avoid getting weighed down in detailed disputes, as European law may also be better served by concentrating on substantive issues¹¹⁰. It will be for the national courts alone to review the adequacy and compatibility of national procedural rules for the effective application of Community law. The creation of new national procedures is a legislative, rather than a judicial, task. The initiation of such procedures by the European Court of Justice is a function beyond its competence. Otherwise we would be talking of the “government of the judges”, “the Europe of the judges”¹¹¹, where the Court, in order to cure the inactivity of the Community legislator in this area, acts as a genuine legislator based on principles it has formed through its case law. It is interesting to see that the approach that the European Court of justice adopted through out the years has shifted and has not been a straightforward one¹¹². This change is a result of the ad hoc nature of the cases, which are brought before it, and of its relationship with the other community Institutions, the political climate and the promotion of the principle of subsidiarity.

Those criticising the Court’s approach have proposed some possible solutions to the problem. It is interesting to see that in order to achieve the effective protection of Community rights, it has been argued that the European Court of Justice should adopt principles and apply tests which were previously applied in the area of the internal market. It has been therefore proposed¹¹³ that in situations where the European Court of Justice has to deal with national procedural rules and the question of whether such rules are incompatible with Community law, the *Keck*¹¹⁴ principle should be used. According to this principle certain national procedural rules, which do not by their

¹⁰⁹ S. Prechal, *EC Requirement for an Effective Remedy*, in *Remedies for Breach of EC Law*, edited by J. Lonbay and An. Biondi, John Wiley and Sons, 1997, p. 12; C. Bontinck, *La protection du justiciable grâce à l’application par le juge national du droit communautaire*, in *Judicial Protection of Rights in the Community Legal Order*, Bruylant, Bruxelles, 1993, p. 177

¹¹⁰ A. Biondi, *supra* n° 103, p. 1287.

¹¹¹ Ed. Garcia de Enterría, *The Extension of the Jurisdiction of National Administrative Courts by Community Law: The Judgment of the Court of Justice in Borelli and Article 5 of the EC Treaty*, (1993) 13 YEL., p. 36.

¹¹² G. De Búrca, *National Procedural Rules and Remedies: The Changing Approach of the Court of Justice*, in *Remedies For Breach of EC Law*, edited by J. Lonbay and An. Biondi, John Wiley and Sons, 1997, p. 37.

¹¹³ An. Biondi, *supra* n°103, p. 1284.

¹¹⁴ Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097

nature prevent access to the full application and protection of Community rights or impede this application more than they impede domestic rights, do not fall within the scope of Community law and should not be subject to interpretation as they do not hinder the effective protection of Community rights before national courts¹¹⁵. Transplanting the *Keck* formula to national procedural rules may seem a far-reaching process. After all, the Court of Justice has created this formula based on rules concerning the freedom of goods in the European Union and had no intention of creating a general principle applicable in all areas of Community law. However, its application to procedural rules may help the Court's interpretation as to whether the principle of non-discrimination is applied by the national courts when dealing with Community rights. In order to find an effective formula for the uniform application of Community law in national jurisdictions there is no need to search for principles that have been applied in other areas of Community law. Procedural law has its own particular nature and could never be compared with substantive rules and their interpretation by the Court of Justice. The principle of effectiveness and the principle of non-discrimination are well established through the jurisprudence of the court and there is no need to confuse such principles with other formulas aiming for a different goal.

The primary responsibility of the European Court of Justice that of ensuring the uniform application of Community law before national courts may be considered sufficient where the process of harmonisation of national legal remedies has not yet been undertaken. But nevertheless, the solutions that the judgments suggest will not lead to uniformity but rather simply eliminate any inconsistencies between national procedural rules and effective Community law rules. This consequence can be drawn from the fact that the Court has shifted its focus away from the disapplication of national procedural rules to the creation of new national remedies. Such approach needs harmonised legal remedies in order for uniform rights to be adequately secured throughout the Community. It is apparent that there is a demand for a higher level of procedural harmonisation and that there should be a Community led program of systematic measures in response, rather than the incremental¹¹⁶ approach adopted by

¹¹⁵ In order to support his proposal, Andrea Biondi presents a series of cases where the Court of Justice had to deal with national procedural rules. See: Case C-126/97 *Eco Swiss v. Benetton*, Case C-412/97 *E.D.Srl v. Italo Fenocchio*.

¹¹⁶ Chr. Himsworth, *supra* n° 21, p. 292

the Court of Justice in so far. It has been proposed¹¹⁷ that uniform application of Community rights rests on three aspects. First, it is essential to define the exact scope of the rights conferred to individuals by Community law. Secondly, adequate sanctions must be available for the application and enforcement of those rights. Finally, legal remedies must be available for the protection of those Community rights. This project would be better achieved through Community legislation and harmonised procedural rules.

In my opinion the uniform application of Community law will be achieved through harmonisation of procedural rules. The creation of a single European market demands the creation of a single judicial system too. Even if procedural law can be considered to be of a strong national character, the need for the approximation of those rules is a result of the evolving nature of the European Union. Having established an internal market, the realisation of a consistent judicial system of remedies in all Member States will reassure the citizens of the European Union that they have the right to the adequate and equal protection of their Community rights. Community law has a well established substantive law and has provided its citizens with all adequate rights as part of the European legal order. However, in order for the substantive law to effectively achieve goals set out in the Treaty, a European procedural law needs to be established. As the enforcement and application of Community law depends on national authorities, and as long as substantive and procedural law are in a cause and effect relationship, the formation of common procedural rules throughout the Member States should be part of the future goals of the Community institutions. Recognition of this last point is affirmation that matters such as rights of defence, time limits, interim relief, and evidence are a primary responsibility of the European Union in co-operation with national authorities. The effective protection of Community rights must be settled in a way that guarantees uniformity of application and legal certainty. The time is ripe to make a step forward and accomplish what previously was considered inevitable, the harmonisation of national legal remedies.

¹¹⁷ W. Van Gerven, *Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies*, (1995) 32 CML Rev., p. 679

CHAPTER IV**INTERIM RELIEF BEFORE THE NATIONAL COURTS****IV.1) The creation of a system of interim protection of EC rights before the national courts**

Apart from an available remedy before the European Courts under the Treaty provisions, interim relief constitutes an essential aspect of the effective judicial protection of Community rights before national courts¹. When dealing with rights which individuals derive from Community law, the issue which must be considered is whether an effective and uniform protection can be achieved in national jurisdictions, in the absence of harmonised Community rules. The issue of providing adequate remedies and national procedural rules has several applications in the law of remedies, one of them being the provisional, temporary judicial protection of Community rights before national courts.

When dealing with the issue of interim relief before national jurisdictions one has to take due account of the two different sides of the coin, which are nevertheless intertwined. On the one hand, the granting of interim relief has a national dimension as the implications and legal consequences that can arise in an existing national legal order with specified remedies and procedures are essential. Each Member State has its own procedural rules and therefore the interaction with Community law can lead to possible anomalies in the proper function of each national legal system. The issue, at a national level, is not just Community supremacy versus national rules, but the effective protection of Community rights from the national courts². In proceedings before national courts, interim relief for Community rights is a matter for the national judge to decide. However national law does not exclusively govern this matter³. The possible intrusion of European law through legislation and judgments has been a concern for national jurisdictions who still feel reluctant to accept it unconditionally.

On the other hand, from a European point of view, interim protection of Community rights creates issues involving the uniform application of Community law

¹ See R. Joliet, *Protection juridictionnelle provisoire et droit communautaire*, Rivista di diritto europeo, Rome, No 2, 1992, p. 253-284

² W. van Gerven, *Of Rights, Remedies and Procedures*, (2000) 37 CML Rev., p. 2,

³ T. Tridimas, *The General Principles of EC Law*, Oxford University Press, 1999, p. 303

as well as the effective and uniform protection of Community law throughout the Community. The principles of primacy and direct effect of Community law are not satisfactory to guarantee the effective protection of individuals' Community rights. When a claim of Community law is brought before the national courts, the national procedural rules are in principle to be applied. At this level, Community law has not created a systematic body of rules and therefore the law of remedies is still governed by domestic law, even if the fundamental principles of supremacy and direct applicability are fully recognised by national jurisdictions. At a Community level, the issue of interim relief embodies the danger of a non-uniform and non-effective protection of Community rights, as long as all Member States have reserved their so-called "procedural autonomy".

This dual dimension can be justified from the fact that interim relief before national courts involves judgments of national courts as well as judgments of the European Court of Justice when references for a preliminary ruling have been made. Both the reaction of national judges and the approach of the European Court of Justice need to be illustrated in order to comprehend interim relief as a national remedy for individuals on the one hand and an application of the principle of effective protection of Community rights on the other.

The European Court of Justice had to deal with cases concerning interim relief before national jurisdictions and through its judgments a system of interim protection of Community rights has been formed. The essential national cases including their preliminary questions to the European Court of Justice and the latter's response on the preliminary reference are *Factortame*, *Zuckerfabrik* and *Atlanta*⁴. They stand as the main guidelines for the creation of a system applicable to national courts for the protection of Community rights until final judgment on the substance of the case is given. Although each particular case deals with a different legal issue of interim relief, the contribution of the ECJ's judgments to each one has been essential for the formation of a uniform and effective system of interim protection of individuals' rights.

⁴ Case C-213/89 *R. v. Secretary of State for Transport, ex parte Factortame Limited and Others* [1990] ECR I-2433, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn* [1991] ECR I-415, Cases C-465 and 466/93 *Atlanta Fruchthandelsgesellschaft and Others v. Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761

In particular the judgment of the European Court of Justice in *Factortame*⁵ is the locus classicus⁶ on the matter of interim relief before national courts, where the lawfulness of a national measure is in issue. The point of law⁷ finally decided was, whether in a case concerning Community rights, national law could prevent national courts from granting interim relief for the protection of rights deriving from Community law, which have not yet been established⁸. However, according to the preliminary reference made, the legal issue concerned the existence, or not, of the power, and/or the obligation of national courts to grant such interim relief. Furthermore, if such jurisdiction existed, the conditions under which such interim relief should be granted needed to be clearly determined⁹.

⁵ *Regina v. Secretary of State for Transport, ex parte Factortame Ltd.*, English High Court, Queen's Bench Division, (1989) 2 C.M.L.R. p.353, *Regina v. Secretary of State for Transport, ex parte Factortame Ltd.* English Court of Appeal, (1989) 2 C.M.L.R. p. 392, *Regina v. Secretary of State for Transport, ex parte Factortame Ltd.*, (1989) 3 C.M.L.R. p. 1.

⁶ P. Oliver, *Interim Measures: Some Recent Developments*, (1992) 29 CML Rev., p. 10

⁷ The issue of the compatibility of the Merchant Shipping Act 1988 with Community law was later on dealt in two cases before the ECJ: Case C-221/89 *Regina v. Secretary of State for Transport, ex parte Factortame Ltd.*, 1991 [ECR] I-3095, Case C-246/89 *Commission v. United Kingdom*, 1991 [ECR] I-4585

⁸ A.G. Toth, note on Case C-213/89 *Regina v. Secretary of State for Transport, ex parte Factortame Ltd and Others*, (1990) 27 CML Rev., p. 583.

⁹ The facts of *Factortame* are as follows: The applicants' fishing vessels were prevented from any commercial activity due to section 14 of the Merchant Shipping Act 1988 as none of the vessels could fulfil the conditions for a British ownership. They therefore sought the declaration from the English courts setting aside such decision and requested an interim order allowing them to continue their commercial operation. The applicants argued that the conditions of the Merchant Act 1988 were incompatible with principles of Community law and in particular in breach of several directly effective Community provisions conferring to them the right of non-discrimination on grounds of nationality, the right of establishment and the right to participate in the capital of a company in all Member States under the same conditions as the nationals. In addition according to principles of constitutional law the grant of interim relief to suspend Parliamentary acts was forbidden and therefore English courts were precluded from provisionally setting aside any national measure. The House of Lords recognised that directly enforceable Community rights were part of the legal heritage of every EU citizen and automatically available with unrestricted retroactive effect. It took the view that it would be preferable not to decide on whether Community law overrides English law in relation to the power to grant interim relief in the circumstances of the present case. Therefore it unanimously decided to refer the following preliminary question to the Court of Justice: "(1) Where-(i) a party before the national court claims to be entitled to rights under Community law having direct effect in national law (the rights claimed), (ii) a national measure in clear terms will, if applied, automatically deprive that party of the rights claimed, (iii) there are serious arguments both for and against the existence of the rights claimed and the national court has sought a preliminary ruling under Article 177 whether or not the rights claimed exist, (iv) the national law presumes the national measure in question to be compatible with Community law unless and until it is declared incompatible, (v) the national court has no power to give interim protection to the rights claimed by suspending the application of the national measure pending the preliminary ruling, (vi) if the preliminary ruling is on the event in favour of the rights claimed, the party entitled to those rights is likely to have suffered irreparable damage unless given such interim protection, does Community law either (a) oblige the national court to grant such interim protection of the rights claimed or (b) give the court power to grant such interim protection of the rights claimed?"

(2) If question 1(a) is answered in the negative and question 1(b) in the affirmative, what are the criteria to be applied in deciding whether or not to grant such interim protection of the rights claimed?"

In *Zuckerfabrik*¹⁰ the application of interim relief by national courts was again at issue, as in *Factortame*. However, in the present cases Community Law created an obstacle, which prohibited national jurisdictions to grant interim relief. Because of the exclusive competence of the European Court of Justice to decide on the validity of a Community measure, the national courts had no power to even provisionally deal with such matter. The German Courts referred a question to the European Court of Justice and asked whether Article (2) EC Treaty precluded them from granting the suspension of a national administrative measure implementing a Community regulation¹¹. If such power was not precluded, the German Courts requested the European Court of Justice to specify the conditions, which should be fulfilled, in order to grant such interim relief. *Zuckerfabrik* can be considered as a landmark for the reason that it places the protection of the individual in the foreground, even before the question of the priority of Community law¹².

Finally, although *Factortame* and *Zuckerfabrik* laid the ground for interim relief of individuals' rights, *Atlanta* goes a step further, as it empowers national courts to grant "positive" interim measures¹³. The references of the German administrative court concerned two different questions: on the one hand, the extent of the power of the national courts to grant interim relief in a case of serious doubt as to the legality of

¹⁰ A sugar company _Zuckerfabrik Süderdithmarschen brought an action before the Finanzgericht Hamburg for the annulment and the suspension of the enforcement of the Hauptzollamt Itzehoe's (customs office) decision requiring the applicant to pay a sum of money in respect of a special elimination levy introduced by Council Regulation 1914/87. The applicant claimed that the EC Regulation was invalid. Furthermore another sugar company- Zuckerfabrik Soest brought proceedings before the Finanzgericht Düsseldorf for the annulment and suspension of the customs office's decision of 20 October 1987, which also required the applicant to pay DM1.675.013.31 in respect of a special elimination levy introduced by the same Council Regulation.

¹¹ The German Courts ordered the suspension of the enforcement of the contested decisions and by further orders they stayed the proceedings on the substance of the cases before them pending the preliminary ruling on the questions they had referred to the ECJ under Article 177 EC Treaty. The Court of Justice joined the cases for the purposes of the judgment, in accordance with Article 43 of the Rules of Procedure and gave a preliminary ruling to the following question: (1)(a) *Is the second paragraph of Article 189 of the EEC Treaty to be interpreted as meaning that the general application of regulations in Member States does not preclude the powers of national courts to suspend, by way of an interim measure, the operation of an administrative measure based on a regulation until a decision is reached in the main action?*

(b) *If so, under what conditions may national courts adopt interim measures? Is there an applicable criterion of Community law and if so which? Or do interim measures depend on national law?*
(2) *Is Council Regulation (EEC) No 1914/87 introducing a special elimination levy in the sugar sector for the 1986/87 marketing year invalid? in particular is it invalid because it infringes the principle that regulations imposing taxation must not be retroactive?*

¹² H.G. Schermers, note on Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Suderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, (1992) 29 CML Rev., p. 137

¹³ G.Bebr, note on Cases C-465 and 466/93, *Atlanta fruchthandels-gesellschaft and Others v. Bundesamt für Ernährung und Forstwirtschaft*, (1996) 33 CML Rev., p. 800

a Community regulation by provisionally regulating the private parties' legal position. On the other hand, it concerned the conditions under which the national court can grant these positive interim measures¹⁴.

Obviously the mere demonstration of the legal issues raised before the European Court of Justice justifies the importance of these three cases to the creation of a system of interim protection of individuals before the national courts. Although each case has its own implications and consequences for the national legal orders¹⁵ and need to be examined separately, each one forms part of the general tension of the European Court of Justice to intrude in national jurisdictions and create a uniform and effective interim protection for rights deriving from Community law. Furthermore, one needs to keep in mind that these judgments are part of a general approach of the

¹⁴ With the entry into force of the common market in bananas the German authorities issued to Atlanta Fruchthandelsgesellschaft mbH a provisional tariff quota for importing bananas from third countries. On those grounds Atlanta brought an action against Germany before the Verwaltungsgericht Frankfurt am Main claiming that the decisions should be declared void and in the alternative it should be allocated an unlimited or at least increased import quotas. The applicant challenged the validity of Council Regulation No. 04/93 and requested the German Court to order interim measures, in the form of suspending the import restrictions resulting from the common market and in the alternative by issuing additional import licenses. The German Court ordered the competent authorities to issue provisionally import licenses and at the same time referred a questions concerning the validity of the contested Council Regulation. In addition the German administrative court asked the ECJ the following question: "May a national court which entertains serious doubts as to the validity of a Community regulation, and has therefore referred the question of the validity of the Community regulation to the Court of Justice under the preliminary ruling procedure, by making an interim order provisionally settle or regulate the disputed legal positions or relationships, with reference to an administrative act of a national authority based on the Community regulation in respect of which the reference has been made, for the period until the Court of Justice gives its ruling?"

If the question is answered in the affirmative:

Under what conditions is a national court empowered in such cases to make an interim order? Must a distinction be drawn, with respect to the conditions for making an interim order, between an interim order which intended to preserve an already existing legal position and one which is intended to create a new legal position?"

¹⁵ There are several articles written on the implications of *Factortame*: R. Churchill, *Fisheries: can quota hopping be stopped?* (1989) 14 EL Rev., p. 470-474; E. Szyszczak, *Sovereignty: crisis, compliance, confusion, complacency?* (1990) 15 EL Rev., p. 480-488; P. Allott, *Parliamentary Sovereignty- From Austin to Hart*, C.L.J., Vol. 49, part 3, November 1990, p. 377-380; P.P. Craig, *Sovereignty of the United Kingdom Parliament after Factortame*, (1991) 11 YEL., p. 221-255; A.I.L. Campell, *adrift on a Sea of Community Law?* (1991) SLT, p. 89; K.D. Magliveras, *The effects of Factortame*, (1990) SLT, p. 341; J. Drexler, *Was Sir Francis Drake a Dutchman?-British Supremacy of Parliament After Factortame*, *The American Journal Of Comparative Law*, 1993, Vol. 41, p. 551-571; B. De Witte, *Sovereignty and the Demands of Community Law: the Development of "Peaceful Coexistence"* (1945-1990), in *The European Courts and National Courts- Doctrine and Jurisprudence*, edited by A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler, Hart Publishing, 1998, p. 277-304; P.B. Rodford, *Le premier conflit reel entre droit communautaire et droit constitutionnel britannique: L'arrêt Factortame*, (1991) G.P., nos 69-71, doc., p. 9-10; J. Bell, *Sur les pouvoirs du juge britannique d'adresser des injonctions à la Couronne*, (1990) RFDA, p. 920; S. Boryon and L.N. Brown, *L'affaire Factortame: droit communautaire contre droit public anglais*, (1994) RFDA, p. 70-79; P. Kinder-Est, *Primauté du droit communautaire et droit anglais ou comment concilier l'inconciliable*, (1991) RAE, p. 19; P. Le Mire, *Droit découlant des dispositions communautaires: Compétence des juridictions nationales pour ordonner des mesures provisoires en cas de renvoi préjudicial*, A.J.D.A., 1990, p. 832-836

European Court of Justice trying to reinforce the relation between Community and national authorities and to safeguard uniform application of the rule of Community law by national courts. *Factortame*, *Zuckefabrik* and *Atlanta* are cases which appeared in a specific period of time, when other judgments concerning the protection of individuals' rights were proposing a new way to deal with national remedies and procedures in cases involving Community rights¹⁶.

IV.2) *Factortame* as a third generation judgment

It has been strongly argued and accepted that *Factortame* is ranked among the greatest judgments of the European Court of Justice in the field of procedural law¹⁷. It concerned questions of Community law regarding the adoption of all necessary judiciary mechanisms in order to guarantee the effectiveness of Community law¹⁸. This third generation case illustrates a fundamental reassessment of national procedural rules and causes of action, within the context of Community minimum standards, which will have to be provided by the Court¹⁹. Although the judgment of the European Court of Justice has been narrow and laconic, its implications and consequences are fundamental for the reinforcement of national procedural law and

¹⁶ Case 199/82 *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* [1983] ECR 3595; Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891; Case 222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; Case 355/85 *Mr Driancourt, Commissioner of Police, Thouars v. Michel Cognet* [1986] ECR 3231; *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723; Case 311/85 *ASBL Vereniging van Vlaamse Reishureaus v. ASBL Sociale Dienst van de Plaatselijke Gewestelijke Overheidsdiensten* [1987] ECR 3801; Case 222/86 *Union nationale des entraineurs et cadres techniques professionnels du football v. George Heylens and others* [1987] ECR 4097; Joined Cases 142 and 156/84 *British-American Tobacco Company Ltd and R.J. Reynolds Industries Inc. v. Commission* [1987] ECR 4487; Joined Cases C-87/90, C-88/90 and C-89/90 *Verholen and Others* [1991] ECR I-3757; Case C-208/90 *Theresa Emmott v. Minister for Social Welfare and Attorney General* [1991] ECR I-4269; Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifazi and Others v. Italian Republic* [1991] ECR I-5357; Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475; Case C-228/92 *Roquette Freres SA v. Hauptzollamt Geldern* [1994] ECR I-1445; Case C-410/92 *Elsie Rita Johnson v. Chief Adjudication Officer* [1994] ECR I-5483

¹⁷ See H. Labayle, *l'effectivité de la protection juridictionnelle des particuliers*, Rev.fr.Droit.adm. 8 (4) juill-aout 1992, p. 625 ; P. Oliver, *Interim Measures: Some recent Developments*, (1992) 29 CML Rev., p. 10 ; J-C. Bonichot, *les pouvoirs d'injonction du juge national pour la protection des droits conférés par l'ordre juridique communautaire*, note sous Cour de justice des Communautés Européennes, 19 juin 1990 *Factortame*, Rv.fr.Droit.adm. 6 (5), sept-oct. 1990, p. 914; A. Barav and D. Simon, *Le droit communautaire et la suspension provisoire des mesures nationales. Les enjeux de l'affaire Factortame*, (1990) R.M.C., no 340, p. 591; N. Gravells, *Disapplying an Act of parliament pending a preliminary Ruling: Constitutional Enormity or Community Law Right?*, (1989) Public Law, p. 568; J. Cavallini, *le juge national du provisoire face au droit communautaire- les contentieux français et anglais*, Bruylant, Bruxelles, 1995, p. 251

¹⁸ J-C. Bonichot, *supra* n°17, p. 920

¹⁹ D. O'Keeffe, *General Course in European Community Law, The Individual and European Law*, in *Collected Courses of the Academy of European Law*, Volume V, Book 1, p. 83

Community law²⁰. From a Community law viewpoint the *Factortame* goes beyond the mere application of the established principles of supremacy and direct applicability of Community law and in contrast it re-establishes the need for effective protection of individuals' Community rights before national jurisdictions. The revolutionary part of this judgment is the establishment of interim protection as part of the principle of effectiveness of Community rights by imposing on the national judge dealing with interim relief the mission to act as a community judge. The European Court of Justice emphasises the role of national courts in the application of Community law and settles the general principle of law for an effective remedy before national jurisdictions for the individuals' protection.

The House of Lords had clearly and coherently presented the questions to the European Court of Justice. After analysing the factual and legal issues of the case, the House of Lords asked the European Court of Justice to decide whether under Community law a national court was obliged or empowered to grant interim relief of the rights claimed by the applicants until final judgment is given. Following this question the House of Lords invited the European Court of Justice to set out the criteria of such interim protection, in case the national court was only empowered to grant such interim relief. In other words, the main purpose for the preliminary reference to the European Court of Justice was whether the power of granting interim protection, which was not yet recognised as a matter of English law by national courts, was vested to the latter by Community legislation.

The European Court of Justice underestimated the importance of the questions and dealt with the matter in a narrower manner²¹. In particular it considered that the essential issue of the reference was whether a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must disapply that rule. It therefore neglected fundamental aspects of the case and not surprisingly provided an inadequate reply²². It approached the question as a simple matter of Community law supremacy and held that under Community law a national court, in a case concerning Community

²⁰ J-C. Fourgoux, *La Cour de Justice des Communautés Européennes et les pouvoirs du juge national en matière de mesures provisoires*, note sous CJCE 19 juin 1990, Recueil Dalloz Sirey, no 39, 22 novembre 1990, p. 548

²¹ A. Barav, *Interim relief and English law*, (1990) NJL, p. 899

²² A. Barav, *The effectiveness of judicial protection and the role of the national courts*, in *Judicial Protection of Rights in the Community Legal Order*, Bruylant, Bruxelles, 1997, p. 272

law, should set aside the national rule, which it considers to be the sole obstacle preventing it from granting interim relief²³. Furthermore *Factortame* demonstrates the Court's tendency to deal with the issue of national procedural autonomy. Although the European Court of Justice went on to establish the necessary functions for the effective protection of community rights, it avoided dealing with the conditions under which the national court has to order interim relief. The particular judgment re-established the limits of the exclusive competence of national jurisdictions on procedural matters but the silence of the European Court of Justice showed its unwillingness to interfere with national procedural rules by creating a new remedy²⁴.

In the instant case, the Court did nothing more than applying the principle of supremacy of Community law as it was clearly stated in *Simmenthal*²⁵. According to the traditional principle national courts had to do everything necessary to set aside a national provision, which might preclude, even temporarily, Community rules from being fully enforceable and effective. Furthermore it referred to Article 5 (now article 10) EC and stressed that according to the principle of co-operation it was for the national courts to ensure the legal protection of the individuals' rights deriving from directly effective Community provisions²⁶. With a narrow reference to the principle of effectiveness of Community law and to the potential damage that the effectiveness of the preliminary proceedings would suffer if the national court could not grant interim relief, the European Court of Justice thought that it could adequately overcome the two obstacles, which prevented the English Courts from granting interim relief, i.e. the presumption of validity of an Act of Parliament and the rule excluding any interim injunction against the Crown²⁷. The United Kingdom Government pointed out that the principle of the presumption of validity of such an Act could not be considered discriminatory, as there is no distinction made between domestic and Community law. Furthermore the British government made a reference to the case law of the European

²³ Case C-213/89, *Regina v. Secretary of State for Transport, ex parte Factortame Ltd and Others* [1990] ECR I-2433

²⁴ F. Grevisse et J-C. Bonichot, *Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle dans les états membres*, in *L'Europe et le droit*, Mélanges Boulois, 1991, p. 309; A. Pliakos, *Le principe général de la protection juridictionnelle efficace en droit communautaire*, Sakkoulas, Bruylant, 1997, p. 233

²⁵ Case 106/77 *Amministrazione delle finanze dello Stato v. Simmenthal SpA* [1978] ECR 629

²⁶ Case 811/79 *Ariete SpA v. Amministrazione delle finanze dello Stato* [1980] ECR 2545, Case 826/79 *Mireco v. Amministrazione delle finanze dello Stato* [1980] ECR 2559

²⁷ D. Oliver, *Fishing on the Incoming Tide*, (1991) MLR, p. 447

Court of Justice²⁸ and stressed the principles of non-discrimination and of effectiveness for the protection of Community rights before national courts. It was not for the European Court of Justice to create new remedies in the national jurisdiction, as this is an exclusive competence of the latter. It concluded that the United Kingdom's position with regard to remedies was fully in accordance with Community law and thus the protection of individuals may be secured by the ability of the national court to seek a preliminary ruling by the European Court of Justice and by the submission of the Commission of an application for interim measures under Articles 185 and 186 EC Treaty²⁹.

Even if the European Court of Justice managed to give a ruling on the preliminary reference, which was accepted by the House of Lords when the case returned to it, the main question had not yet been correctly answered. The European Court of Justice had just interpreted the question of the mere existence of the power to grant interim relief, to a simple question of how to exercise such a power³⁰. In contrast, the English Courts had tried to make clear that the main difficulty of the case was not a national provision preventing them from granting interim relief, but the absence of jurisdiction to do so. In his opinion Advocate General Tesouro pointed out that main question raised before the Court was whether the obligations which Community law imposes on the national courts concerning the protection of rights conferred directly on individuals also include the requirement to order the suspension, by way of interim relief, of the application of national law, which is alleged to be incompatible with Community law. Acting under a misapprehension the European

²⁸ Case 45/76 *Comet v. Produktschap voor Siergewassen* [1976] ECR 2043, Case 33/76 *Rewe v. Landwirtschaftskammer Saarland* [1976] ECR 1989, Case 130/79 *Express Dairy Foods v. Intervention Board for Agricultural Products* [1980] ECR 1887, Case 199/82 *Amministrazione delle finanze dello Stato v. San Giorgio* [1983] ECR 3595, Joined Cases 331, 376 and 378/85 *Bianco and Girard v. Director General for Customs* [1988] ECR 1099, Case 35/76 *Simmenthal v. Italian Minister for Finance* [1976] ECR 1871

²⁹ Ireland repeated the case law of the European Court of Justice with regard to national remedies and stressed out that it would be inappropriate to require the creation of new remedies in national law. The differences between Member States as to the right of interim protection, in Ireland's point of view, should be removed only by Council legislation and as long there is no harmonisation in such an issue, such a problem should be dealt with a direct action from the Commission against the particular Member State.

The Commission made a comparative survey of Community and national legislation on interim relief. Then it referred to the relevant case law of the European Court of Justice and concluded that the national courts were required to protect individuals' rights deriving from directly effective Community provisions by providing them effective remedies. National courts were empowered and not obliged to grant interim relief in such cases. It stated that in the absence of a remedy for damages the only effective remedy left for the applicants was interim relief.

³⁰ A. Barav, *supra* n° 22, p. 272

Court of Justice had easily relied on the principles it had already established in its case law but has not really answered the question put to it by the House of Lords³¹.

Therefore it cannot be doubted that the principle of supremacy could not be an adequate legal basis for the judgment of the European Court of Justice in *Factortame*. The House of Lords clearly stated in point (v) of the preliminary reference that the national court had no power to grant interim protection of rights by suspending the application of the relevant national measure. In addition Lord Bridge stated that such power would have consequences contrary to the Parliament's sovereignty, unless there was a principle of Community law which would oblige the national courts to provide a remedy to protect putative Community rights. If English law could not provide an effective remedy for the interim protection of putative Community rights, the House of Lords showed its willingness to create one under Community Law³². However the European Court of Justice just ruled that the national court had to "set aside" any national provision, which prevented interim protection, without though giving any substantive reply or indicating to the national court all necessary steps to be taken.

In such a case, the national judge was left in a delicate situation, where he had to set aside a national rule, which did not exist in first place, and furthermore depend on his own national procedural principles which still did not provide him the power to grant interim relief in order to safeguard Community rights. The principle of supremacy used by the European Court of Justice urging the national court to set aside a national rule does not consequently incorporate the obligation for the national jurisdiction to take any positive action, in particular creating a new remedy for the effective protection of Community rights. The principle of *Simmenthal* only guarantees the abolition of any national procedural provision, which would prevent the full effectiveness of Community law. Yet it is in the national procedural law that the national judge will have to find the appropriate measures in order to safeguard Community rights. The notion of supremacy does not offer any criteria or guidelines for the appropriate selection of measures for the protection of rights deriving by Community law³³.

³¹ A.G. Toth, note on Case C-213/89 *Regina v. Secretary of State for Transport, ex parte Factortame Ltd and Others*, (1990) 27 CML Rev., p. 586

³² See speech of Lord Bridge in *Regina v. Secretary of State for Transport, ex. parte Factotame*, (1989) 3 C.M.L.R 1

³³ J. Cavallini, *supra* n° 17, p. 344

In the light of these considerations, the principle of supremacy is far away from being sufficient to deal with the issue raised by the House of Lords. *Factortame* went beyond the notion of Community law being superior to national law, and incorporated issues concerning the consequences that such supremacy can have for national jurisdictions³⁴. Although the European Court of Justice intended to establish interim relief as part of the principle of effective protection of individuals' Community rights, the principle of supremacy cannot be considered the right choice for such an objective. In contrast the national judge is facing the problem of conforming to the notion of interim protection of Community rights, even if the national procedural law does not recognise such a concept³⁵.

IV.3) The principle of effectiveness of EC Law in *Factortame* as the legal basis for interim relief

After referring at some extent to *Simmenthal*, the European Court of Justice stated that the full effectiveness of Community Law would be impaired, if a national provision could preclude a court seized of a dispute governed by Community law from granting interim protection in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law³⁶. It should be emphasised that the essential legal basis for which interim relief was acknowledged in the instant case is the principle of effectiveness of Community law³⁷. The European Court of Justice, even if it gave a surprisingly short judgment for such an important issue, finally managed to introduce the power of the national judge to grant interim relief for the protection of individuals' Community law rights. However it ended up speaking just of the duty of the national court to set aside a rule of national law which prevents it from giving interim relief required by Community law. Such duty could not adequately demonstrate the breadth the Court's wishes to secure the interim relief of rights deriving from Community law. As stated above the principle of supremacy can only guarantee the minimum application of Community

³⁴ M. Ross, *Refining effective enjoyment*, (1990) 16 EL Rev., p. 479

³⁵ J. Cavallini, *supra* n° 17, p. 350

³⁶ Case C-213/89 *Regina v. Secretary of State for Transport, ex parte Factortame Ltd and Others*, [1990] ECR I-2433, at I-2474

³⁷ A. Barav, *supra* n° 22, p. 274

law in national jurisdictions. The mission of the national judge to assure interim protection through Community law can only be achieved through the principle of effectiveness. This point was made clear by Advocate General Tesauro, who stated that “the national court’s duty to afford effective judicial protection for rights conferred on the individual by Community law, where the relevant requirements are satisfied, cannot fail to include the provision of interim protection for the rights claimed, pending final determination”³⁸. For Advocate General Tesauro interim relief has precisely the purpose of ensuring the effectiveness of judicial protection and preventing the potential damage by the fact that the establishment and the existence of the right are not fully contemporaneous.

Therefore the European Court of Justice should have based its judgment on the principle of effective protection of individuals’ Community rights. The power of the national judge to grant interim relief to Community rights claimed by an individual should be expressly linked to the requirement for effective judicial protection which applies in relation to provisions of both Community and national law³⁹. The concept of an effective remedy for the protection of Community rights belongs in the substance of *Factortame*⁴⁰, if more attention is drawn to the previous judgments, which established that principle⁴¹.

In the first place, the *Factortame* judgment re-established the principle that national courts should not be prevented by any national provision, when dealing with issues arising under Community law. In *San Giorgio*⁴² the Court ruled that “any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law”. In addition, in *Johnston*⁴³ the Court declared that a national provision concerning Sex Discrimination incompatible with Community law could not guarantee the effective protection of rights conferred by a Community directive. Furthermore, the Court stated that judicial control should exist for all Community measures conferring rights on individuals.

³⁸ Opinion of AG Tesauro in Case C-213/89 *Regina v. Secretary of State for Transport, ex parte Factortame Ltd and Others*, [1990] ECR I-2433, at I-2463-2464

³⁹ *Ibid.*, at I-2462

⁴⁰ A. Robertson, *Effective Remedies in EEC Law before the House of Lords*, L.Q.R., 1993, p. 28

⁴¹ J. Cavallini, *supra* n° 17, p. 348

⁴² Case 199/82 *Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] ECR 3595

⁴³ Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651

In support of the view that national rules should not restrain national courts from effectively protecting Community law rights, *Factortame* implicitly repeated the need for an effective remedy. In *Heylens*⁴⁴ the Court had ruled that “the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right”. Under this concept, the introduction of interim relief as an essential remedy for the effective protection of Community rights can be strongly justified. The applicants’ Community rights would be in danger if the national law could not provide a remedy, which would effectively protect them, until final judgment was given.

The principle of effective protection of Community law also finds its application in the system established by Article 234 (ex Article 177) EC. The European Court of Justice was concerned with the effectiveness of the system of preliminary reference and stated that its effectiveness “would be impaired if a national court, having stayed proceedings pending the reply by the Court of Justice to the question referred to it for a preliminary ruling, were not able to grant interim relief until it delivered its judgment following the reply given by the Court of Justice”⁴⁵. The judgment of *Factortame* shows that, as an overriding principle of Community law, effective judicial protection of individuals’ Community rights obliges national courts to provisionally protect the rights claimed pending the preliminary ruling. Any legal obstacles or presumptions of validity of the claimed rights should not be strong enough to deny the granting of interim measures. This concept was even previously demonstrated in *Foto-Frost*⁴⁶, where the European Court of Justice showed its willingness to allow, in certain circumstances, the national court to declare a Community act invalid in the case of proceedings relating to an application for interim measures. Although *Factortame* focused on the grant of interim measures against a national measure, the European Court of Justice was still ready to interfere with national procedural rules in order to safeguard the effective protection of Community rights and the purpose of the preliminary ruling proceedings. It gave priority to the individual’s rights and revolutionarily established that interim relief should be awarded, even by temporarily suspending an Act of Parliament, in order to

⁴⁴ Case 222/86 *UNECTEF v. Heylens* [1987] ECR 4097

⁴⁵ Case C-213/89 *Regina v. Secretary of State for Transport, ex parte Factortame Ltd and Others* [1990] ECR I-2433, at I-2474

⁴⁶ Case 314/85 *Foto-Frost v. Hauptzollamt Lubeck-Ost* [1987] ECR 4199

benefit the individual's protection in the Community legal order. In addition, interim relief can eliminate the threat of a national judge avoiding to make a preliminary reference: why ask the European Court of Justice on the applicability of a measure, while the legal consequences of such measure would have already taken effect, creating probably irreversible situations?⁴⁷

Following this analysis the wording used in the *Factortame* judgment can be better understood. Although the ruling simply obliges the national court to set aside a national rule which prevents it from granting interim relief, the substantial contribution of the judgment is that the national court must give interim relief, if it is required by Community law, even if national law did not purely empower it to do so⁴⁸. Its power derives from the principle of Community law, which demands the adoption of all judicial remedies for the effective protection of Community rights.

IV.4) *Zuckerfabrik*-the development of interim protection of EC rights

The judgment in *Zuckerfabrik*⁴⁹ went a step further in the development of the Community legal order with regard to the interaction of Community and national judicial systems and the evolution of the judicial protection of individuals' rights throughout the Community⁵⁰. With respect to the role of the national court in the Community legal order *Zuckerfabrik* is the turning point, showing the end of an important period, where the principles of supremacy and direct applicability of Community law were established in national courts, and the beginning to a new period heralding an essential new focus, the need for judicial review before national jurisdictions. This present case is a landmark for the reason that it so clearly places the protection of the individual in the foreground, even before the question of priority of Community law⁵¹.

⁴⁷ H. Labayle, *supra* n° 17, p. 626

⁴⁸ J. Temple Lang, *The Principle of Effective protection of Community Law Rights*, in *Judicial review in European Union Law*, edited by D. O'Keefe and A. Bavasso, Volume I, Kluwer Law International, 2002, p. 241

⁴⁹ Joined Cases C-143/88 and 92/89 *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn* [1991] ECR I-415

⁵⁰ I. Hardcastle, *Interim Measures in Proceedings Concerning EC Law: New Departures*, EBLR, April 1994, p. 95

⁵¹ H.G. Schermers, note on Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, (1992) 29 CML Rev., p. 137

In this case, the European Court of Justice held that the right of the individual to challenge, before national courts, the legality of a Community measure, which is the legal basis of a national administrative measure, would have no effect, if the individual could not demand the national court to provisionally suspend the national administrative measure. The plaintiff in the main proceedings, *Zuckerfabrik Süderdithmarschen*, argued that the power to suspend the national measure based on a Community regulation derived from the system of judicial protection in the Community and pointed out that such power could not be limited on the ground that the general scope and direct applicability of the Community Regulation could not be secured. Furthermore, the *Zuckerfabrik* judgment confirms the European Court of Justice's willingness to focus on the principle of effective judicial protection by stating that Article 189 par 2 EC Treaty should not be interpreted as precluding national courts from suspending provisionally a Community act⁵².

In order to comprehend the significance of the judgment, it is essential to examine it in relation to previous judgments, where the European Court of Justice established the foundations for the effective judicial protection of individuals. In particular *Foto-Frost*⁵³ was the first judgment which indicated the emergence of a competence of national courts to deal with the validity of Community measures. The European Court of Justice in that case held that national courts did not have the power to rule Community acts invalid, but such prohibition could be limited in certain circumstances in the case related to an application for interim relief. In *Zuckerfabrik* the Commission submitted that when granting interim relief the national court is not giving a decision on the validity of the Community Regulation but merely considers whether there are interests which need protection until final judgment is given on the substantive issues. The European Court of Justice obviously applied the *Foto-Frost* limitations and considered that, pending delivery of a judgment of the Court under Article 234 (ex Article 177) EC, individuals should be in a position to obtain an order from a national court granting the suspension of enforcement of the disputed Community Regulation⁵⁴. Therefore one of the significant elements of the

⁵² P. Le Mire, note sous *C.J.C.E., Zuckerfabrik*, A.J.D.A., 1991, p. 240

⁵³ Case 314/85 *Foto-Frost*, [1987] ECR 4231

⁵⁴ See *Zuckerfabrik*, *supra* n° 49, para. 17. In its submissions the Italian Government pointed out that if the national court were not able to suspend the national measure, private applicants would be deprived of any judicial protection by means of interim measures on the grounds that they could not in principle challenge directly the validity of a Regulation before the Court or ask the latter to suspend its application or grant other interim measures. In contrast the United Kingdom Government stated that

Zuckerfabrik judgment is that the national jurisdictions are now allowed to indirectly rule on the legality of a Community measure and inevitably the national court can overcome the obstacle of the presumption of validity of Community acts. The European Court of Justice tried, and succeeded, in overcoming the ambiguity that *Foto-Frost* created by realising that in interim relief proceedings, its exclusive competence to declare an act invalid could refuse the national judge from exercising his/her power correctly. A late response from the European Court of Justice under proceedings of Article 234 (ex article 177) EC could create irreparable damages to the individual. Furthermore, it seemed incoherent to admit that the suspension of a Community measure could be granted before the European Court of Justice, although the national administrative measure executing the Community act could not be temporarily paralysed by the individual before the national court⁵⁵.

In addition to *Foto-Frost* the European Court of Justice referred to its *Factortame* judgment and tried to reinforce its meaning and even go further. In particular in *Zuckerfabrik* the European Court of Justice confirmed the similarities of the two cases concerning interim relief of measures based on Community law before national jurisdictions. Even if the issue was not identical- in *Zuckerfabrik* the prohibition to grant interim relief did not derive from national law as in *Factortame*, but from Community law- the European Court of Justice recognised the system of interim legal protection of individuals under Community law. Therefore there was no reason to apply different standards within the context of interim protection of individuals in respect of the existence and the recognition of a jurisdiction of a national court to grant interim relief⁵⁶. Apparently, considering the role of the national courts as part of system for the effective protection of Community law rights, the European Court of Justice gave them the power not to apply Community law if such application could be unreasonably detrimental to the rights of individuals⁵⁷. Furthermore, in reflecting on the notion of a coherent system of interim protection and the principle of uniform application of Community law, the European Court of Justice

national courts had no jurisdictions to suspend a national measure based on a Community regulation by reference to the *Foto Frost* judgment.

⁵⁵ H. Labayle, *L'effectivité de la protection juridictionnelle des particuliers- le droit administratif français et les exigences de la jurisprudence européenne*, Rev. fr.Droit adm. 8 (4) juill.-août 1992, p. 628

⁵⁶ L. Papadias, *Interim Protection under Community Law before the National Courts. The right to a Judge with Jurisdiction to Grant Interim Relief*, L.I.E.I., 1994/2, p. 182

⁵⁷ H.G. Schermers, *supra* n° 51, p. 138

went on for the first time to indicate the conditions under which the national law could grant the suspension of a Community measure.

The *Zuckerfabrik* judgment incorporates a number of revolutionary elements concerning the effective protection of Community law. Firstly, the European Court of Justice stressed the importance of an effective protection of Community rights but focused more on the effective protection of the rights of individuals. Secondly, it created a new competence for the national courts, reinforcing the notion of the national judge being a Community judge too. Finally it overcame the obstacle of procedural autonomy and put the foundations for the *communitarisation* of the interim relief system before national jurisdictions.

IV.5) The effective protection of the individual in the foreground

Until the *Zuckerfabrik* was brought before the European Court of Justice, the principle of direct applicability of a Community Regulation implied that the national judge would have to comply with the effects of such measure, even if it was suspected to be invalid. It was the first time that the European Court of Justice had to deal with the consequences that such a principle could have to the effective application of Community law before national courts and the effective protection of individuals before national jurisdictions. The problem centred on the question as to whether the power of the national judge to grant the suspension of a national administrative measure based on a Community Regulation, could bring the effective application of Community law under scrutiny. An intervention by the national judge could create problems for the direct applicability of Community regulations⁵⁸.

The difficulty for the European Court of Justice was that, by authorising the national courts to suspend a national measure applying a Community regulation, national jurisdictions would be allowed to question the presumption of the validity of the Community measure, which was claimed before them⁵⁹. The European Court of Justice had already ruled that it had exclusively competence to rule on the validity for a Community measure, and therefore national courts were deprived of such powers⁶⁰. But this prohibition created conflicts in relation to interim relief, and in particular to

⁵⁸ H. Labayle, *supra* n° 54, p. 628

⁵⁹ J-M. Fevrier, *La jurisprudence communautaire et le contentieux administratif du sursis à exécution*, L'Actualité juridique-Droit administratif, 20 decembre 1995, p. 868

⁶⁰ See Case 314/85 *Foto-Frost*, [1987] ECR 4231

the power of a national judge to suspend a national administrative measure based on a Community regulation. The suspension of the enforcement of a Community Regulation can be ordered directly before the European Court of Justice under Article 242 (ex. Article 185) EC. Yet in *Zuckerfabrik* the national judge can indirectly and provisionally suspend a Community Regulation when deciding to suspend the national administrative measure based on the Community measure. Therefore, the effectiveness of the Community Regulation as being the legal basis of the inferior national measure is automatically jeopardised too, even though only the judgment of the European Court of Justice could in principle affect it. The exclusive competence of the European Court of Justice to deal with the validity of a Community measure was now at issue with respect to the system of interim protection before national courts. Under which principle of Community law could the national judge suspend indirectly the Community Regulation without having the right to rule on its validity? Even if the suspension of the enforcement of the Community measure does not rule on its validity, such power of the national court would still be contrary to the principle of the uniform and direct applicability of Community law, as it had been pronounced in *Foto-Frost*⁶¹.

Facing a Community procedural law obstacle, the European Court of Justice could not depend on the principle of direct application or supremacy of Community law. It focused on the protection of the individual in order to overcome the difficulty of the *Zuckerfabrik*. Based on the principle of effectiveness of Community law the European Court of Justice considered the limited protection that individuals had before it. In order to grant interim relief for a Community measure under Articles 242 and 243 (ex Articles 185 and 186) EC, there has to be a direct action brought before the European Court of Justice concerning that Community measure. According to the Community procedural law, the chances for an individual to bring an admissible action concerning a Community Regulation are limited. An individual party needs to prove that the Community decision related to the action brought before the European Court of Justice is addressed to him or that the contested Regulation affects him individually and directly. Therefore, the limited protection of individuals through a direct action before the European Court of Justice and the dependence of an

⁶¹ B. Mongin, *Le juge national et les mesures provisoires ordonnées en vertu du droit communautaire*, in *Evolution récente du droit judiciaire communautaire*, edited by V. Christianos, Maastricht, European Institute of Public Administration, 1994, p. 129

application for interim relief to the success of that direct action, put the individual in a position, where his/her rights could not be adequately and effectively protected. This consequence seemed to the European Court of Justice even more important to deal with and subsequently gave priority to the effective protection of the individual. Even if the Court had previously stated⁶² that, through the proceedings of Article 234 (ex Article 177) EC, the individual could still indirectly challenge, as a preliminary issue, the validity of a Community measure that right would be compromised in proceedings of interim relief before the national courts. In such proceedings the individual party could still challenge the legality of a Community regulation, as a preliminary reference to the European Court of Justice. However without having the right to request the suspension of the Community act, pending the ruling of the European Court of Justice, it would expose him/her to irreparable consequences and would leave the interim relief procedure with no effect⁶³. Following the opinion of Advocate General Lenz⁶⁴, who stressed that the refusal to allow the national court to suspend a national administrative measure would have serious consequences for the legal protection of individuals, given that they are not entitled to contest the validity of a Community regulation directly before the Court of Justice, the latter emphasised on the creation of an effective protection for these parties.

Apparently, based on the Community legal system of judicial protection as it has been formed from its judgments, the European Court of Justice showed concern for the individual's position within the judicial system. Even if there have been series of cases establishing the possibilities for the individual to protect his/her rights deriving from Community law, this protection seemed still ineffective. In addition to the nature of the different procedures before it, where the validity of a Community measure could be challenge, the European Court of Justice tried to establish an effective interim relief protection before the national courts. Previous rulings on the protection of Community rights before national jurisdiction did not seem adequate for the European Court of Justice in *Zuckerfabrik*, as this would not reinforce the

⁶² See *Zuckerfabrik*, *supra* n° 49, para 16, where the Court of Justice repeated what was previously held in *Foto-Frost*. In the latter case the Court of Justice admitted that the preliminary ruling procedure was another indirect way to challenge the legality of Community measures. See Hartley, *Constitutional Problems of the European Union*, Oxford, Hart Publishing, 1999, p. 34; A. Arnulf, *The European Union and its Court of Justice*, Oxford University Press, 1999, p. 62

⁶³ A. Pliakos, *le principe général de la protection juridictionnelle efficace en droit communautaire*, Sakkoulas/Bruylant, 1997, p. 234

⁶⁴ See Opinion of Advocate General Lenz in Joined Cases C143/88 and C-92/88 *Zuckerfabrik*, [1991] ECR I-477, para. 28

protection of individuals in proceedings of interim relief. In its groundbreaking judgment it pronounced the importance of that procedure as it has been ruled in *Factortame* but went on to complete it by providing a more effective remedy to individuals in order to protect their Community rights. The *Zuckerfabrik* judgment followed national law tradition, where the right for interim relief has been recognised as part of the fundamental human right for effective protection. According to the objective of the Community legal system to protect all individuals' rights deriving from its law, the European Court of Justice strengthened this objective by acknowledging the right of individuals for effective judicial protection, as part of their rights under Articles 6 and 13 of the ECHR, to suspend a Community measure before national courts⁶⁵.

IV.6) The creation of a new competence for national courts to grant interim relief-Implications

The exclusive competence of the European Court of Justice to rule on the validity of Community measures, limited the protection of individuals at an interim relief stage of a case before national courts. Therefore the European Court of Justice recognised a Member State competence, necessary to sufficiently comply with the need for an effective protection of Community rights. But this recognition had created ambiguities with respect to the principle of presumption of validity of Community measures and to the established monopoly of the European Court of Justice to deal with such issues⁶⁶. The reasoning in *Zuckerfabrik* embodies a number of revolutionary points that need to be clarified in order to fully grasp the significance of the judgment.

The European Court of Justice emphasised that an application for the suspension of a national administrative measure implementing a Community Regulation was based on Community law itself, in a similar way as in disputes where the compatibility of a national measure with Community law is contested⁶⁷. Referring to the coherence of interim legal protection, the Court had to remedy the problem of

⁶⁵ H.Labayle, *supra* n° 54, p. 629

⁶⁶ See H.G. Schermers, *supra* n° 50, p. 135. The former president of the ECJ, Mertens de Wilmars clearly stated in 1986 that national court were absolutely incompetent to suspend the application of community acts.

⁶⁷ See *Zuckerfabrik*, *supra* n° 49, para. 20

the inadequate protection of individuals under Community law in order to serve the principle of effective and uniform application and protection of Community rights. Previously in *Factortame* it had overcome the obstacle of procedural autonomy and interfered with national procedural law by granting the national judge with the power to award interim relief, even if that power was prohibited under national legislation. In contrast to that ruling, the European Court of Justice in *Zuckerfabrik* had to intrude into its own procedural system, which acted as the barrier for national courts to grant interim relief. It realised that the remedies provided at a Community as well as at a national level were not effective for the interim protection of the rights contested.

In particular, in *Zuckerfabrik* the preliminary question created a difficulty as to the possible solutions it could have given in order to serve the well-established principle of effective protection: On the one hand, it could have denied the national courts of any power to suspend Community measures respecting the principle of procedural autonomy. On the other hand, reinforcing its exclusive competence towards the validity of Community acts, it could have ruled that Community measures could only be suspended under an application of Article 242 (ex Article 185) EC. Neither of these two possibilities would be sufficient. The refusal of any member State competence would strip interim relief before national jurisdictions of any effectiveness. The recognition of the exclusive competence of the European Court of Justice to grant interim relief for Community measures would not place the individual's protection in a better position. Furthermore, a revolutionary ruling recognising the power of the European Court of Justice to order interim relief in proceedings under Article 234 (ex Article 177) EC would still not comply with the principle of effective protection, as at a national level the individual would not be immediately protected in the interim relief stage of the litigation⁶⁸. In addition, granting the possibility for the Court of Justice to order the suspension of a Community regulation, in proceedings under Article 234 (ex Article 177) EC, would probably require Treaty amendments⁶⁹.

Therefore, in order to correctly apply the principle of effective protection the European Court of Justice denied that it has exclusive competence to deal with the validity of Community law. It recognised that its own system of interim legal

⁶⁸ J. Cavallini, *supra* n° 17, p. 416

⁶⁹ E. Sharpston, *Interim Relief in the National Courts*, in *Remedies for Breach of EC Law*, edited by J. Lunday and An. Biondi, John Wiley and Sons, 1997, p. 53

protection should be altered by announcing that the national judge was also competent to deal with the validity of a Community measure by suspending it provisionally. Yet the creation of a dual jurisdiction did not really establish the national judge as competent to rule a contested measure invalid, as this power still exclusively remained with the Court of Justice⁷⁰. Nevertheless suspending the enforcement of a national administrative measure does not have the effect of rendering the Community regulation invalid with the same consequences that this ruling has in proceedings before the Court of Justice. However, the national judge was now given a power deriving from Community law and was given the task of acting as a Community judge.

The recognition of a new competence for the national courts to suspend a Community measure could raise questions as to the future effectiveness of an application for interim relief under Articles 242 and 243 (ex Articles 185 and 186) EC. It can easily be argued that the exclusive competence of the Court on this matter could be transformed to a general competence awarded to both Community and national courts. Parties challenging a Community measure can claim interim relief before national courts leaving the purpose and the limitations of an application for interim relief before the European Court of Justice with no practical use. However such conclusion cannot be justified. There is no limitation prohibiting remedies for granting interim relief being applicable both to Community and national jurisdictions. Although the case was based on different facts, in *Factortame* Advocate General Tesauro stated that “nor does there seem to be any justified basis for arguing a contrario that individuals are already afforded sufficient protection by virtue of the possibility open to the Commission, in the context of infringement proceedings brought under Article 169, to apply to the Court of Justice for interim measures”⁷¹. Applying this statement to the present case the Court did not intend to preclude any interim relief application before national courts on the basis that the same remedy was available to individuals before it. In addition, the fact that individuals could not claim the invalidity of the contested Community Regulation under Article 230 (ex Article 173) EC and subsequently apply for interim relief before the European Court of Justice, could not justify the denial of the power to claim a suspension of that measure

⁷⁰ I. Delicostopoulos, *Le process civil à l'épreuve du droit processuel européen*, L.G.D.J, Paris, 2003, p. 280

⁷¹ See Opinion of Advocate General Tesauro in Case C-213/89 *Factortame Ltd and Others*, [1990] ECR I-2450, para. 32

before national courts⁷². In *Zuckerfabrik* the Court justified the new competence as part of the process of national authorities to implement Community regulations and therefore the interim legal protection guaranteed by Community law allowed individuals to challenge the legality of these Community regulations⁷³. The dual competence for the suspension of a Community measure cannot be considered as mutually exclusive. They both serve the principle of effective protection of individuals, who according to Community law have access to both Community and national courts. However, as has been argued, such situation may create problems for the legal certainty of Community law as in an application for the suspension of a Community regulation under Article 242 EC, the Court might have to find solutions to contradictory orders, when simultaneously the same case is brought before national jurisdictions⁷⁴.

IV.7) *Atlanta*-the existing principles of interim relief and their extension

*Atlanta*⁷⁵ gave a chance for the European Court of Justice to review its existing jurisprudence on the issue of interim relief before national jurisdictions and its potential extension to issues which have not previously been considered before it. For the first time the European Court of Justice had to rule on the adoption of “positive” interim measures before the national courts and highlight the conditions that the latter had to follow in order to exercise their power. This issue, although similar to the one ruled in *Zuckerfabrik*, urged the European Court of Justice to consider a possible extension to the competence of a national court to order the suspension of a national administrative measure implementing a Community Regulation. Even if it was only four years since such a matter had come before the European Court of Justice, it was already clear that the existing jurisprudence (*Factortame* and *Zuckerfabrik*) did not give answers to all the related issues that national courts would have to face in proceedings of interim relief with respect to the uniform application of Community law and the effective protection of individuals’ rights deriving from it. In relation to the *Zuckerfabrik* judgment it was argued that it would be incorrect to limit the

⁷² J. Cavallini, *supra* n° 17, p. 413

⁷³ See *Zuckerfabrik*, *supra* n°49, para. 16

⁷⁴ P. Laurent, *Le juge national juge communautaire des référés*, Gaz. du Pal., Paris, Gazette européennes, nos 4 et 5, p. 29

⁷⁵ Cases C-465 and 466/93, *Atlanta Fruchthandelsgesellschaft and Others v. Bundesamt für Ernährung und Forstwirtschaft*, [1995] ECR I-3761

competence of the national judge to the simple issue of suspension of the execution of an act⁷⁶. With respect to the preliminary reference from the Verwaltungsgericht in the *Atlanta* proceedings, the European Court of Justice was finally able to elaborate on the established principles established in its previous judgments and reinforce the powers of the national judges. It widened the power of national judges to grant “positive” interim measures, as a logical sequence of its effort to develop a coherent legal system, extending this principle to Article 243 EC Treaty⁷⁷.

It dealt with the issue whether Article 189 (now Article 249) EC precluded national judges from ordering “positive” interim measures with reference to a national administrative measure implementing a Community Regulation, which is the subject of a preliminary reference brought before it⁷⁸. As the starting point of its judgment the European Court of Justice leaned heavily on *Zuckerfabrik* and *Factortame*. It repeated that Article 189(2) could not constitute an obstacle to the legal protection of individuals, which includes their right to challenge, as a preliminary issue, the legality of a Community regulation before national jurisdictions and to request the national courts to refer questions to the Court for a preliminary ruling⁷⁹. In addition, such right would be compromised if the individuals could not obtain the suspension of the enforcement of the contested Community regulation⁸⁰. Furthermore the European Court of Justice established a close link between *Atlanta* and *Factortame*. It repeated that in cases concerning the compatibility of a national measure with Community law, the national court had the power to suspend the disputed national legislation until the European Court of Justice could deliver its judgment on the issue⁸¹. “The interim legal protection... must remain the same, irrespective whether they contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself”⁸².

Having re-established the right of individuals to obtain interim protection in the form of suspension of a Community Regulation before national jurisdictions, the European Court of Justice extended this right to the adoption of positive interim

⁷⁶ J. Cavallini, *supra* n° 17, p. 423

⁷⁷ G. Bebr, note on Cases C-465 and 466/93, *Atlanta Fruchthandels-gesellschaft and Others v. Bundesamt für Ernährung und Forstwirtschaft*, (1996) 32 CML Rev., p. 805

⁷⁸ See *Atlanta*, *supra* n° 74, para. 19

⁷⁹ See *Atlanta*, *supra* n° 74, para. 20, 25

⁸⁰ See *Atlanta*, *supra* n° 74, para. 21

⁸¹ See *Atlanta*, *supra* n° 74, para. 23

⁸² See *Atlanta*, *supra* n° 74, para. 24

measures based on the coherence of the interim legal protection⁸³. Firstly, it pointed out that the coherence of the system of interim protection required that national courts should be able to order the suspension of enforcement of a national administrative measure based on a Community regulation, the legality of which is contested⁸⁴. Article 234 (ex Article 177) EC is considered to be an indirect action provided for the individuals in order to challenge the validity of a Community measure⁸⁵. Compared to the action of annulment under Article 230 (ex Article 173) EC, the preliminary ruling procedure gives the individuals the additional opportunity to claim the illegality of a Community measure before a national court and ask it to refer the relevant question to the European Court of Justice. Following the opinion of Advocate General Elmer, the European Court of Justice formed an analogy between the interim protection of rights, which can be granted in an action under Article 230 EC for the review of the validity of a Community measure and the interim protection of rights, which can be obtained in an application before national courts with respect to the same questions as are referred to the European Court of Justice under Article 234 EC⁸⁶.

The similarity of an action for annulment and the preliminary procedure under Article 234 EC urged the European Court of Justice to create a system of interim relief parallel to the one established under Articles 242 and 243 EC, when the validity of a Community measure is challenged before the national courts. With this perspective the European Court of Justice endorsed a unified system of interim relief⁸⁷. It ruled that in the context of an action for annulment Article 185 (now Article 242) EC authorised the Court to suspend the contested act and conferred on it the power to prescribe any necessary interim measures under Article 186 (now Article 243) EC⁸⁸. Thus, in proceedings before national courts the individual should have the same protection, either seeking the suspension of a Community regulation or the adoption of interim measures settling the legal position of the parties until the judgment of the European Court of Justice is given. Furthermore, the European Court of Justice seemed to follow the reasoning of Advocate General Elmer, who argued that it was difficult to draw any clear dividing line between Articles 185 and 186 (now

⁸³ R. Mehdi, *Le droit communautaire et les pouvoirs du juge national de l'urgence*, (1996) 32 R.T.D.E., p. 81

⁸⁴ See *Atlanta*, *supra* n° 74, para. 22

⁸⁵ See *Foto-Frost*, *supra* n° 60, para. 16

⁸⁶ See Opinion of Advocate General Elmer, Case 465/93, *Atlanta Fruchthandelsgesellschaft v. Bundesamt für Ernährung und Forstwirtschaft*, [1995] ECR I-3763, para. 23

⁸⁷ R. Mehdi, *supra* n° 82, p. 81

⁸⁸ See *Atlanta*, *supra* n° 74, para. 27

Articles 242 and 243) EC⁸⁹. He illustrated that in the present case a mere suspension of the contested regulation would have created a situation, where *Atlanta* would be able to import bananas from third countries. In his view the adoption of the positive interim measures from the German Court was the preferable of the two possible solutions with respect to the facts of the present case. The European Court of Justice held that the power of national courts to order interim relief corresponded to the jurisdiction reserved to the Court of Justice by Article 186 (now Article 243) EC in the context of actions brought under Article 173 (now Article 230) EC⁹⁰. Therefore the European Court of Justice extended the power of national courts to grant interim measures from the coherence of the interim legal protection as it is justified from the Treaty provisions⁹¹. The interests of the coherence of the interim relief system made it substantive to give to national jurisdictions the possibility to grant interim measures referred to in Article 243 EC in connection with references to the European Court of Justice for preliminary rulings on the validity of the Community Regulation.

IV.8) Conditions for granting interim relief

IV.8.A) *Restrain to national procedural autonomy*

Apart from clarifying the issue regarding the existence of an obligation, or power, of the national court to grant interim relief for the protection of Community law rights, the European Court of Justice was also asked to give guidance on the criteria to be applied when granting interim relief. The House of Lords expressly referred a question on the criteria to be applied in case the European Court of Justice stated that Community law gives the power to the national court to grant interim measures, without though obliging it to do so⁹². However the European Court of Justice did not give a reply to this question.

In first place the silence of the Court of Justice could reflect confirmation of the Advocate General Tesauro's view that the conditions and procedural methods for

⁸⁹ See Opinion of Advocate General Elmer in *Atlanta*, *supra* n° 85, para. 19

⁹⁰ See *Atlanta*, *supra* n° 74, para. 39

⁹¹ The same view was expressed by *Atlanta* and the French, Italian Governments and the Commission.

⁹² See question 2 of the preliminary reference in *Case Regina v. Secretary of State for Transport, ex parte Factortame*, (1989) 3 C.M.L.R. 1

interim relief should be determined by the legal system of the Member State, on condition that “those methods and pre-conditions do not make it impossible to exercise on an interim basis the rights claimed and are not less favourable than those provided for in order to afford protection to rights founded on national provisions, any provision of national law or any national practice having such an effect being incompatible with Community law”⁹³. In addition the silence of the Court of Justice could be interpreted as showing its intention to limit at a minimum level its interference with national procedural rules⁹⁴. Ruling on such a point would oblige the European Court of Justice to give a Community law definition to interim relief before national jurisdictions, as long as Community law is concerned. It would seem therefore that the *Factortame* judgment respected the previous case-law establishing the principle of national procedural autonomy and considered it enough to repeat that national rules on the issue of interim protection will continue to apply in cases in which compatibility of national law with Community rules is in question. As it was argued, any ruling on the criteria to be applied by the national court would result to an unwarranted interference by the Community in national law⁹⁵.

However the *Factortame* judgment should be interpreted in a different way. Based on the principle of effective protection, the European Court of Justice went beyond the limits of national procedural autonomy by ruling that the national court had to set aside any national measure, which prevented it from granting interim relief. The application of the principle of procedural autonomy would just urge the national judge to eliminate any national measure in order to create a procedure compatible with Community law. Yet the *Factortame* judgment was not that, as the elimination of the national measure would automatically leave the national judge with no legal basis to grant interim relief against the Act of Parliament⁹⁶. As it has been stated the disapplication of a national provision could not have the legal effect of creating the jurisdiction for the court to grant interim relief, when such jurisdiction did not exist before⁹⁷. Following the *Factortame* judgment the national judge would have to set aside a negative rule, a prohibition to grant interim relief against an Act of Parliament resulting in a situation where no national rule would exist to settle the issue of interim

⁹³ Advocate General Teasuro's Opinion in *Factortame*, *supra* n° 38, para. 34

⁹⁴ F. Grevisse et J-C. Bonichot, *supra* n° 24, p. 309

⁹⁵ P. Oliver, *supra* n° 17, p. 17

⁹⁶ J. Cavallini, *supra* n° 17, p. 358

⁹⁷ A. Toth, *supra* n° 31, p. 586

relief against these acts. Therefore it would be fallacious to limit the effect of *Factortame* to a mere disaplication of a national measure without considering the consequences that such disaplication would have for the national judge. It is these consequences that highlight the particularity of the case: the European Court of Justice did not apprehend the non-existence of jurisdiction of national courts to grant interim relief. By declaring that it was for the national court just to set aside the national rule, it presumed that English law provided already the courts with a power to grant interim relief⁹⁸.

Nevertheless, this interpretation creates a number of ambiguous issues to be clarified. The presumption of an existing jurisdiction for granting interim relief under English law can easily justify the *Factortame* judgment. In respect of the procedural autonomy of Member States, the European Court of Justice did not provide any guidance for establishing rules in order not to overcome the limitation of creating new remedies before national courts. But this conclusion, even if it is compatible with the fundamental guidelines that the European Court of Justice concerning the interaction of Community law with national procedural rules, does not appear satisfactory. One may wonder what would have happened if the European Court of Justice had expressively stressed that the main issue of the case was not a positive rule preventing national courts to grant interim relief but the absence of jurisdiction to do so. Would the principle of effective protection prevail over the procedural autonomy of national jurisdictions? Would the European Court of Justice overcome the obstacle of not intending to create new remedies before the national courts to favour the protection of Community rights?

In this particular case, the way to confront the interaction of the English judicial system with the Community legal order would be for the national courts to create a new remedy as ordered from the Community. However, in order to accept that the *Factortame* judgment is implicitly requiring the national courts to create an effective remedy for interim relief, it is essential to read the judgment in relation to *Rewe*⁹⁹, where it was held that the EC Treaty did not intend to create new remedies, other than those already existing in national jurisdictions for the protection of Community rights. This case established the “no new national remedy” principle even if it resulted in the

⁹⁸ J. Cavallini, *supra* n° 17, p. 359

⁹⁹ Case 158/80 *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel* [1981] ECR 1805; See also Lord Donaldson of Lymington, *Can the judiciary control Acts of Parliament?* (1991) *The Law Teacher*, p. 7-8

failure of a Member State to enforce Community measures¹⁰⁰. However the European Court of Justice took a more intrusive approach towards the national procedural rules and therefore it should not be argued that *Rewe* really established a principle, which could not be overridden¹⁰¹. The “no new national remedy” principle cannot be easily reconciled with the Community’s task of effectively protecting Community rights through the national courts¹⁰². In addition, the substantive issue of whether to create a new national remedy really arose in *Factortame*, where the European Court of Justice had the ideal opportunity to place the relationship of Community law and national procedural rules at a different, more logical level. *Factortame* indicates the desire of the European Court of Justice to incorporate national procedural rules in the Community legal order¹⁰³. Therefore it has to be accepted that the *Factortame* judgment created a new approach towards national remedies and through the disapplication of the national measure, it obliged the national courts to create a new remedy for the effective protection of the rights claimed.

Even if the *Factortame* judgment created this new remedy for interim relief, its narrow wording could not justify this innovative approach. Moreover, the Court’s silence in relation to the precise criteria, strengthens the argument that the Court ruled under a misapprehension of the legal issues. The European Court was facing an important issue, which had not been previously brought before it and therefore needed to give some guidance to the national jurisdictions¹⁰⁴. Its silence created the danger of different interpretation from national courts in issues concerning interim relief. It is suggested that the European Court of Justice could have set out the criteria for granting interim relief. Taking a different approach from Advocate General Tesouro, because of the absence of harmonisation at the Community level it could have indicated the reasonable criteria from its own system of interim protection¹⁰⁵.

Following these considerations, *Factortame* still remains open to divergent interpretations. Its decision left maximum leeway for national judges to apply domestic rules when deciding whether or not to grant interim relief¹⁰⁶. However, it

¹⁰⁰ A. Ward, *Judicial Review and the Rights of Private parties in EC Law*, Oxford University Press, 2000, p. 19

¹⁰¹ See chapter III for analysis of the ECJ cases on the issue of national procedural rules

¹⁰² A. Barav et D. Simon, *le droit communautaire et la suspension provisoire des mesures nationales. Les enjeux de l’affaire Factortame*, (1990) R.M.C., n° 340, p. 596

¹⁰³ J. Cavallini, *supra* n° 17, p. 361

¹⁰⁴ J-C. Bonichot, *supra* n° 17, p. 919

¹⁰⁵ A. Toth, *supra* n° 31, p. 587

¹⁰⁶ A. Ward, *supra* n° 99, p. 29

still remains the solid foundation of future rulings of the European Court of Justice towards a uniform system of interim protection in all Member States.

IV.8.B) *Zuckerfabrik/Atlanta-The “communitarisation” of the conditions for interim relief before national courts*

The uniform application of Community law has urged the Court of Justice to go a step beyond *Factortame* and specify the conditions under which the power of national courts to suspend a Community measure, or order positive interim measures, was to be exercised¹⁰⁷. In contrast to the *Factortame* judgement, where the intention of the Court of Justice was not to interfere with national procedural law, in a subsequent case it considered the national courts as its partners in the process for judicial review and introduced the new set of conditions based on Community law¹⁰⁸. The difference between the *Zuckerfabrik/Atlanta* judgments and *Factortame*, is that, in the latter, the application for interim relief was based on the national judicial system. It was for the Court of Justice to decide whether it was possible to overcome the obstacle of national procedural autonomy. Yet the reasoning of the *Zuckerfabrik* judgment is based on the intervention of the national court in a field where procedural autonomy is not at stake, as it concerns the Community legal system itself¹⁰⁹. In addition, in *Atlanta*, with extensive reference to the relevant parts of the *Zuckerfabrik*, the European Court of Justice commented on the power of national courts to grant positive interim measures under the conditions provided for under Article 186 EC Treaty, when an application for interim relief is brought before it in relation to an action for annulment¹¹⁰. The Court’s intention was to repeat the principle stressed out in *Zuckerfabrik*, where uniform conditions would be required in order to safeguard the effective and uniform application of Community law¹¹¹.

The “communitarisation”¹¹² of the conditions for a suspension of a Community measure illustrates the intention of the Court of Justice to provide the national courts

¹⁰⁷ See *Zuckerfabrik*, *supra* n° 49, para. 26, *Atlanta*, *supra* n° 74, para. 28

¹⁰⁸ See *Zuckerfabrik*, *supra* n° 49, para. 27

¹⁰⁹ J. Cavallini, *supra* n° 17, p. 428

¹¹⁰ See *Atlanta*, *supra* n° 74, para. 39

¹¹¹ See *Zuckerfabrik*, *supra* n° 49, para. 26

¹¹² H. Labayle, *supra* n° 54, p. 630

with Community law powers¹¹³. As mentioned in the *Zuckerfabrik* judgment, the national judge suspending the administrative measure implementing a Community Regulation acts as part of the Community legal order¹¹⁴. Furthermore, with an affirmative answer to the question concerning the power of a national court to grant positive interim measures the European Court of Justice had the opportunity in *Atlanta* to clarify the conditions under which such interim relief can be granted¹¹⁵. The conditions should be the same irrespective of the form of the interim relief granted: whether it seeks the suspension of enforcement of a national administrative measure based on a Community Regulation, or the grant of interim measures settling or regulating the disputed legal positions or relationships of the parties¹¹⁶. Therefore as long as this new competence of national courts derives from Community law itself, the conditions which need to be fulfilled for its exercise should be provided from the same legal system. Furthermore the uniform application of Community law, a fundamental requirement of the Community legal order¹¹⁷, would be compromised if national law were to determine the criteria under which such power was to be exercised. National procedural rules are different in the various Member States and such disparity could create discrepancies between them¹¹⁸ and consequently to the protection of individuals' rights in different Member States. In its submissions the German Court highlighted that the dependence on the several national procedural rules could lead to discrimination between economic agents in different Member States and therefore the analogous application of Article 83 of the Rules of Procedure could be a guarantee for an equal treatment throughout the Community. In order to avoid such incoherence in the Community legal system, the Court of Justice commented on the new competence of the jurisdiction found under Articles 185 and 186 EC Treaty in the context of actions brought under Article 173 EC Treaty¹¹⁹. The national court had to ignore any national procedural rules, apart from those relating to the making and examination of the application¹²⁰, and apply only the conditions

¹¹³ See A. Collins, *The Availability of Interim Relief in National Courts to Uphold Community Law Rights*, (1992) IJEL, p. 80, where it is stated that national systems are probably in a better position to resolve questions of procedure than the Court of Justice.

¹¹⁴ See *Zuckerfabrik*, *supra* n° 49, para 16-17

¹¹⁵ See *Atlanta*, *supra* n° 74, para. 34

¹¹⁶ See *Atlanta*, *supra* n° 74, para. 28

¹¹⁷ See *Zuckerfabrik*, *supra* n° 49, para. 26

¹¹⁸ See Opinion of Advocate General Lenz in *Zuckerfabrik*, *supra* n° 64, para. 13

¹¹⁹ See *Zuckerfabrik*, *supra* n° 49, para. 27, See *Atlanta*, *supra* n° 74, para. 39

¹²⁰ See *Zuckerfabrik*, *supra* n° 49, para. 26

which must be satisfied for the Court of Justice to allow an application to it for interim relief¹²¹. Already familiar with the system of suspension of Community measure provided by the Treaty provisions, the Court of Justice found it possible to justify the existence of the same power for the national court¹²². In *Atlanta* Advocate General Elmer emphasised that a national court must only suspend a national administrative measure adopted in relation to a Community measure, or prescribe interim measures, in so far as the conditions to Articles 185 and 186 EC Treaty are met¹²³. Having thus established a similar treatment for all possible forms of interim relief, the European Court of Justice tried to simplify the conditions for the grant of such relief and define all the ambiguities that the *Zuckerfabrik* created with its judgment¹²⁴. These harmonised conditions confirm that the national judge suspending a Community measure or prescribing positive interim measures becomes a Community judge in interim relief proceedings.

In this regard when deciding whether to suspend a national measure implementing a Community measure or when the same order is requested in relation to the adoption of positive interim measures, the national judge is obliged to examine that:

“(1) that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in issue before the Court of Justice, itself refers the question to the Court of Justice;

(2) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;

(3) the court takes due account of the Community interest; and

(4) in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the

¹²¹ With regard to the conditions for the suspension of the national administrative measure, the plaintiff sugar company referred to the lack of harmonisation of national procedural rules and stated that any suspension of enforcement of a national measures based on a Community Regulation should be governed exclusively by national law. Moreover the Commission referred to *Rewe* and suggested that any action taken by national courts should be subject to certain conditions which would not change national rules of procedure but would reduce any undermining of the exclusive jurisdiction of the Court to declare a Community act invalid. These conditions, in the Commission's view, were as follows: firstly, the national court should take account of the Community interest; secondly, the national court should seek a preliminary ruling from the Court as to the validity of the Community Regulation before ordering the suspension; thirdly, the national court should stay the proceedings on the validity of the national measure until a preliminary ruling is given.

¹²² J. Cavallini, *supra* n° 17, p. 427

¹²³ See Opinion of Advocate General Elmer in *Atlanta*, *supra* n° 85, para. 25

¹²⁴ R. Medhi, *supra* n° 82, p. 95

regulation or on an application for interim measures seeking similar interim relief at Community level."¹²⁵

Apart from the uniform conditions, which must be fulfilled so far as the granting of interim relief is concerned, the Court of Justice created a new obligation for national courts with respect to the preliminary reference procedure. In particular the *Zuckerfabrik* judgment obliges national courts, when ordering the suspension of a national administrative measure implementing a Community regulation, to refer, should the question on the validity of the contested Community measure not yet have been referred to the Court of Justice, that question stating the reasons for which they believe that the measure must be ruled invalid¹²⁶. By doing so the Court of Justice reinforced the principle in *Foto-Frost*, where national courts could not have jurisdiction to declare a Community measure invalid. The solution adopted shows the Court of Justice's intention to develop a system of judicial control both on all Community measures as well as on national courts. According to the new obligation the national court could not exercise its powers for granting interim relief without putting itself under the control of the Court of Justice¹²⁷.

The Court of Justice considered the case upon the principle of uniform application and effectiveness of Community law. Meanwhile it established that interim relief proceedings were not an obstacle to the preliminary reference procedure. Although in interim relief proceedings the national court does not deal with the substance of the case, nevertheless the effectiveness of Community Law can be safeguarded at that stage. A ruling of the Court of Justice on the validity of a Community measure will ensure the legal certainty of the Community, even if such decision is not given at a stage when the national court are giving a judgment on the substance. In *Zuckerfabrik* the Court of Justice stressed the importance of interim relief proceedings by providing powers to the national judge as if he/she were dealing with the validity of the Community measure. Advocate General Lenz focused on the significance of the interim relief procedure and stated that even if the procedure was

¹²⁵ See *Atlanta*, *supra* n° 74, p. I-3796. See *Zuckerfabrik*, *supra* n° 49, para. 33, where the Court of Justice held that the national court could suspend a national measure based on a Community regulation: (i) if that court entertains serious doubts as to the validity of a Community measure and, should the question of validity of the contested measure not already have been brought before the Court, itself refers the question to the Court;

(ii) if there is urgency and a threat of serious and irreparable damage to the applicant;

(iii) and if the national court takes due account of the Community's interests

¹²⁶ See *Zuckerfabrik*, *supra* n° 49, para. 24

¹²⁷ J-M. Fevrier, *supra* n° 59, p. 873

of a provisional and summary nature, it could still prevent the practical effectiveness of Community law¹²⁸. Therefore the aim of the obligation for a preliminary reference in interim relief proceedings was to limit the chance for incoherent application of Community law from that early stage, where the actual validity of the measure was not yet decided¹²⁹. “In the interests of procedural economy” the question already submitted to the Court of Justice in interim relief proceedings guarantees the clarification of the point of law from that early stage without waiting for the main proceedings, which might not even follow¹³⁰. It appears that the Court of Justice was ready to reinforce judicial cooperation between Community and national courts. On the one hand, the new obligation gives the opportunity to national courts to decide even provisionally on the validity of the Community measure and therefore ensure the uniform validity and effectiveness of Community law. On the other hand, it guarantees the exclusive competence of the Court of Justice to rule on the validity of a Community measure, as it is certain that either on the interim relief proceedings or the later main proceedings, a preliminary question will be referred to it.

With respect to the obligation of the national court to refer a preliminary question to the Court of Justice, any suspension of a Community measure should have a provisional character, in the sense that it will be enforceable until the Court of Justice has ruled on the validity of the contested measure¹³¹. If such case has not already been brought before the Court of Justice the national court has to address a preliminary reference to it by showing the *prima facie* invalidity of the Community measure. The requirement that national courts need to explain the reasons why they consider the contested measure invalid, is new to the Community judicial review system. Schermers argues that this new requirement is taken from German law, where the courts are under an obligation to mention the grounds of their doubt when requesting a ruling of the German constitutional court on the question of whether a German act is valid under the German constitution¹³². Apparently this additional requirement derives from the need of the Court of Justice to control the power of the national court, which will address the preliminary question after suspending the national administrative measure. As long as the Court of Justice has not already

¹²⁸ See Opinion of Advocate General Lenz in *Zuckerfabrik*, *supra* n° 64, para. 73

¹²⁹ J. Cavallini, *supra* n° 17, p. 419

¹³⁰ See Opinion of Advocate General Lenz in *Zuckerfabrik*, *supra* n° 64, para. 46-47

¹³¹ See *Zuckerfabrik*, *supra* n° 49, para. 24

¹³² H.G. Schermers, *supra* n° 51, p. 139

decided on the validity of the Community measure, the national court has to explicitly address the serious doubts, which justify the suspension of the contested act. Through the obligation to refer to the Court of Justice, the latter can *a posteriori* control the decisions taken by the national judge in interim relief proceedings¹³³. Therefore in such a reference the Court of Justice needs to examine the reasons which the national judge has considered serious enough to suspend the Community measure. The real purpose of that requirement is for the Court of justice to show that conferring that power to national judges, would not mean the absolute freedom for them to do so, as long as the power to declare the contested act invalid still stands within its exclusive competence. "Only the possibility of a finding of invalidity, a matter which is reserved to the Court, can justify the granting of suspensory measures"¹³⁴.

Henceforth, a national court must have serious doubts as to the validity of the contested Community regulation. These serious doubts must be based on the factual and legal circumstances relied on by the applicants, and due account must be taken of the extent of discretion that the Community institutions have in the sectors concerned¹³⁵. In the present case, the European Court of Justice repeated the same condition as it had in *Zuckerfabrik*¹³⁶ but linked the serious doubts on the part of the national court with the possibility of the European Court's finding a Community act invalid¹³⁷. In particular the national court cannot just refer a question to the European Court of Justice on the validity of a Community regulation, but must set out, when making the interim order, the reasons for which it considers that the European Court should find the Community act to be invalid¹³⁸. Such condition reaffirms the European Court's intention to establish its exclusive competence on the matter of validity of Community acts. However the purpose of this condition can be understood in different ways. It can be understood as suggesting that the national court must include in its reference the reasons on which it considers the Community regulation invalid, or, as obliging the national court to state the grounds on which it based its decision to grant interim relief¹³⁹. Such ambiguity is apparent if the wordings of both cases (*Zuckerfabrik*, *Atlanta*) are to be read together. In the first case the European

¹³³ J. Cavallini, *supra* n° 17, p. 422

¹³⁴ See *Zuckerfabrik*, *supra* n° 49, para. 23

¹³⁵ See *Zuckerfabrik*, *supra* n° 49, para. 23, *Atlanta*, *supra* n° 74, para. 35 and 37

¹³⁶ See *Zuckerfabrik*, *supra* n° 49, para. 33

¹³⁷ G. Bebr, *supra* n° 76, p. 801

¹³⁸ See *Atlanta*, *supra* n° 74, para. 36

¹³⁹ G. Bebr, *supra* n° 76, p. 802

Court of Justice held that “it is for the national court...to refer that question itself, setting out the reasons for which it believes that the regulation must be held to be invalid”¹⁴⁰. In *Atlanta* though it was ruled that the national court must set out the reasons for which it believes that the regulation must be declared invalid, when making the interim order¹⁴¹. If the national court’s decision includes the grant of interim relief and the reference of a preliminary ruling to the European Court of Justice there should not be any problem. However, it is possible that the question addressed to the European Court of Justice is made separately and therefore it is still not clear when the national court is obliged to include its grounds on the validity of the Community regulation. The wording of *Atlanta* clarifies the issue, as it is implied that the serious doubts of the national court are considered to be conditions for the grant of interim relief and not for the relevant reference for preliminary ruling. Furthermore this is justified from the fact that the national court is not obliged to refer to the European Court if the validity of the contested measure is already in issue before the European Court of Justice or the latter has previously ruled on the matter¹⁴².

The national court can order the suspension of the contested act or order other positive interim measures only in the event of urgency, Hence the national judge can grant interim relief if such order is necessary to be adopted before the decision on the substance of the case, in order to avoid serious and irreparable damage to the applicant¹⁴³. These conditions, deriving from Community law itself are identical to the conditions applicable to an application for interim relief before the Court of Justice¹⁴⁴. The only difference is that, in practice, their interpretation and the decision whether they are fulfilled is taken from the national courts¹⁴⁵. The latter need to proceed to an evaluation *in concreto* of the circumstances of the particular case¹⁴⁶. Even if the European Court of Justice recognised that the national court has the freedom to evaluate the issue of urgency, it still adds two further requirements. The national court must show that the damage must be such as to be considered to materialise before the European Court’s ruling on the validity of the contested

¹⁴⁰ See *Zuckerfabrik*, *supra* n° 49, para. 24

¹⁴¹ See *Atlanta*, *supra* n° 74, para. 36

¹⁴² See *Zuckerfabrik*, *supra* n° 49, para. 24, *Atlanta*, *supra* n° 74, para. 32

¹⁴³ See *Zuckerfabrik*, *supra* n° 49, para. 28, *Atlanta*, *supra* n° 74, para. 40

¹⁴⁴ For an analysis of these conditions see Chapter II

¹⁴⁵ See *Zuckerfabrik*, *supra* n° 49, para. 29

¹⁴⁶ R. Medhi, *supra* n° 82, p. 95

regulation and such damage will be irreparable, if the contested measure is immediately enforced and cannot be made good, if the contested regulation were to be ruled invalid¹⁴⁷. Finally, according to the *Atlanta* judgment, the purely financial damage cannot be regarded in principle as irreparable¹⁴⁸. The difficulty is that there may be national jurisdictions which are used to a different procedural tradition, and apply the conditions in a different context. The harmonisation of the conditions will oblige the national courts to ignore any procedural rules previously applicable and apply the new set of requirements as set out in *Zuckerfabrik/Atlanta*. Yet the ambiguity exists as to the need for any national legislative adjustments.

As long as the national court has to safeguard the full effectiveness of Community law, it also has the obligation, when granting interim relief, to take into consideration the Community interest. The Court of Justice attempted to remind national courts that the grant of interim relief was part of their “community” power to deal with Community law. According to the Community interest national courts should analyse intensively the validity of the Community measure in order to avoid setting it aside without “proper guarantees”¹⁴⁹. This intensive examination adds a limitation to the adoption of interim measures, as long as such order would deprive the act of all effectiveness¹⁵⁰. Furthermore, the national court has to refrain from granting interim relief, if such order could represent a financial risk for the Community¹⁵¹. In such circumstances, and where national procedural rules do not provide such guarantees, it is for the national court to invent them. Therefore the European Court of Justice reaffirmed that national courts had to take into account the damage which interim relief could cause to the legal regime established by the contested regulation for the Community as a whole¹⁵². By referring just to the Community interest, the Court of Justice highlighted the primacy of the protection of legal certainty compared to the protection of the individual. Such focus could result in losing the purpose of the grant of interim relief, which is the part of the effective protection of the individual’s rights. The Community interest, as represented by the Court of Justice, can mean the denial of the suspension of a Community measure,

¹⁴⁷ See *Atlanta*, *supra* n° 74, para. 41

¹⁴⁸ See *Atlanta*, *supra* n° 74, para. 41

¹⁴⁹ See *Zuckerfabrik* *supra* n° 49, para. 30, See *Atlanta*, *supra* n° 74, para. 42

¹⁵⁰ See *Atlanta*, *supra* n° 74, para. 43

¹⁵¹ See *Zuckerfabrik*, *supra* n° 49, para. 32, See *Atlanta*, *supra* n° 74, para. 45

¹⁵² See *Atlanta*, *supra* n° 74, para. 44

even if there are serious doubts as to the validity of the contested act¹⁵³. The national court is placed in a position, where it is required to examine a huge range of legal and financial issues concerning the Community. *Zuckerfabrik* judgment erected this stringent condition without providing the national court with an answer as to how the Community interest is to be ascertained¹⁵⁴. In such circumstances, and where national procedural rules do not provide such guarantees, it is for the national court to invent them. Therefore the European Court of Justice reaffirmed that national courts had to take into account the damage which interim relief could cause to the legal regime established by the contested regulation for the Community as a whole¹⁵⁵. Still in *Atlanta* the European Court of Justice did not just reaffirm the *Zuckerfabrik* judgment¹⁵⁶ but introduced further conditions that a national court has to respect in relation to the Community interest, when dealing with an application for interim relief. On this point the European Court of Justice seemed much more demanding with regard to the protection of Community interests¹⁵⁷. On the one hand, the national court must consider the cumulative effect which would arise if a large number of courts were also to adopt interim measures for similar reasons¹⁵⁸. The purpose of that condition was to safeguard the effective operation of the legal order established by a Community Regulation. The European Court of Justice seemed to be concerned with the observation of the referring German court, which was concerned with the effectiveness of the regulation in the other Member States¹⁵⁹. This obligation is closely related to the principle of full and uniform application of Community law, which should not be jeopardised unless there are serious doubts as to the validity of the Community measure. However, such requirement is not in conformity with the power to grant interim relief as established in the *Zuckerfabrik* and *Atlanta* judgments, which includes the possibility of several national courts ordering interim measures. Furthermore, the provisional nature of interim measures, and the interim protection of individuals' rights, should be adequate guarantees for the European Court of Justice to allow such a possibility from different national courts in different Member States. But

¹⁵³ J-M. Fevrier, *supra* n° 59, p. 872

¹⁵⁴ E. Sharpston, *supra* n° 69, p. 54

¹⁵⁵ See *Atlanta*, *supra* n° 74, para. 44

¹⁵⁶ See *Zuckerfabrik*, *supra* n° 49, para. 30 and 31

¹⁵⁷ See R. Medhi, *supra* n° 82, p. 96

¹⁵⁸ See *Atlanta*, *supra* n° 74, para. 44

¹⁵⁹ G. Bebr, *supra* n° 76, p. 802

the *Atlanta* judgment does not clearly state whether it means the courts of a Member State of the referring court, or national courts in general¹⁶⁰.

On the other hand, the European Court of Justice requires the national court to take into account “the special features of the applicant’s situation which distinguish him from the other operators concerned”¹⁶¹. This condition could be easily considered as intended to protect temporarily the plaintiff’s interests, as an exceptional special situation¹⁶². However The European Court of Justice seemed to add a requirement similar to the individual and private concern required in an action before it for annulment. A private applicant seeking the grant of interim relief will usually have the same interests and damages as all other operators in the field. Therefore the examination of “special features” could result to the dismissal of the application of interim relief and the individual would be deprived of any temporary judicial protection. The purpose of interim relief is not to protect the exceptional and special legal situation of an applicant, but to safeguard the putative Community rights of individuals in general.

According to the *Atlanta* judgment, the national court has the obligation to take into account all the decisions of European Courts in relation to the validity of the contested Community Regulation. This obligation derives from Article 5 EC Treaty, which provides for the co-operation of all national judicial institutions with the European Courts. Such decision of the European Courts can be given in proceedings of an action for annulment, or in the context of a preliminary reference, or a plea of illegality¹⁶³. This additional requirement comes as a result of the concern of the European Court of Justice for the previous proceedings before it in relation to the *Atlanta* case and the validity of the contested Community Regulation 404/93. This binding force of these previous judgments on the validity of the Community Regulation is fundamental for the protection of an effective and uniform judicial system throughout the Community¹⁶⁴. Therefore a judgment dismissing an action for annulment of the Community regulation on merits and/or a preliminary ruling upholding the legality of the contested regulation prevent the national court from

¹⁶⁰ G. Bebr, *supra* n° 76, p. 803

¹⁶¹ See *Atlanta*, *supra* n° 74, para. 44

¹⁶² G. Bebr, *supra* n° 76, p 802-803

¹⁶³ See *Atlanta*, *supra* n° 74, para. 46

¹⁶⁴ G. Bebr, *supra* n° 76, p. 806

granting interim measures¹⁶⁵. The national court needs to respect the findings of the European courts on the validity of the Community Regulation and refrain from ordering the grant of interim relief. In case the national court has already granted interim relief, it needs to revoke the existing provisional measures¹⁶⁶. However the European Court of Justice ruled that the national court can order the grant of interim relief and refer a question on the validity of the regulation to it for a preliminary ruling, if the grounds of illegality put forward before it differ from the pleas of law, or grounds of illegality, rejected by the Court in its previous judgment¹⁶⁷.

The European Court of Justice added further restrictions to the national court in relation to the obligation to respect its judgments. On the one hand, the national court has to consider the European Court's assessment of the Community interest and the balance between that interest and that of the economic sector concerned¹⁶⁸. The national court has to respect the factual findings of the European Courts in a case with the same situation as the one brought before it. Apparently such obligation derives from the European Court's intention to provide conditions for the grant of interim relief similar to these set out in Articles 185 and 186 EC Treaty. On the other hand, the European Court of Justice tried to outweigh the binding force of its factual findings by ruling that the national court has to consider the extent to which a refusal to order interim measures may be liable to have serious and irreparable effect on important individual interests¹⁶⁹. At this point the European Court of Justice reinforced the purpose of interim relief as a way to protect the rights of individuals. In this case the applicant needs to show a specific situation which differentiates him/her from other operators in the particular sector. If the plaintiff is unable to produce such proof, the national court must accept any decision of the European Courts concerning the serious and irreparable nature of the damage¹⁷⁰. The purpose of this condition is ambiguous. Firstly, the European Court of Justice places the burden of proof on the individual in order for him to show whether the grant of interim relief applies to its specific factual situation irrespective of a previous judgment on the contested Regulation. Such task would give the national court the chance to examine whether the previous findings of the European Courts should be overturned or remain

¹⁶⁵ See *Atlanta*, *supra* n° 74, para. 46

¹⁶⁶ See *Atlanta*, *supra* n° 74, para. 46

¹⁶⁷ See *Atlanta*, *supra* n° 74, para. 46

¹⁶⁸ See *Atlanta*, *supra* n° 74, para. 50

¹⁶⁹ See *Atlanta*, *supra* n° 74, para. 48

¹⁷⁰ See *Atlanta*, *supra* n° 74, para. 49

binding on it. Secondly, the European Court of Justice could be characterised as applying really strict conditions for the interim protection of individuals. For the second time in the same judgment¹⁷¹ it makes clear that individuals should show a particular personal damage that they would suffer if the interim relief were to be refused. Such requirement could demonstrate the European Court's intention to limit the number of individuals being able to receive interim protection on their Community rights. It imposed an additional obligation on Member States courts to respect its findings. This would prevent individuals from receiving interim relief before a national court, where it had already been refused in a direct action under Articles 185 and 186 EC Treaty¹⁷².

IV.9) The consequences of the ECJ's case law on the interim protection of individuals' EC rights

In *Factortame* case Advocate General Tesauro stated that "the national court's duty to afford effective judicial protection to rights conferred on the individual by Community law, where the relevant requirements are satisfied, cannot fail to include the provision of interim protection for the rights claimed, pending final determination"¹⁷³. Eight months later in *Zuckerfabrik* the European Court of Justice created an effective remedy for individuals following the opinion of Advocate General Lenz who stated that "any refusal to allow a national court to suspend a questionable administrative measure would have serious consequences for individuals, given that they are not entitled to contest the validity of the Community regulation in question directly before the Court of Justice, something which is tantamount to depriving them of any legal protection"¹⁷⁴. Finally, in *Atlanta*, the European Court of Justice held that "the interim legal protection which national courts must afford to individuals under Community law must be the same, whether they seek suspension of enforcement of a national administrative measure adopted on the basis

¹⁷¹ See *Atlanta*, *supra* n° 74, para. 44

¹⁷² R. Medhi, *supra* n° 82, p. 97

¹⁷³ See *Factortame*, *supra* n° 23, at I-2463-2464

¹⁷⁴ See *Zuckerfabrik*, *supra* n° 49, at I-482

of a Community regulation or the grant of interim measures settling or regulating the disputed legal positions or relationships for their benefit”¹⁷⁵.

On examining these citations, one can conclude that the Court’s intention was to establish an effective judicial system of interim protection for individuals before national jurisdictions. In a period of no more than five years, through three cases with different legal and factual situations, the European Court of Justice managed to sow the seeds of the concept of individuals rights and to develop in the field of interim relief the principle of complete and effective judicial protection, according to which all individuals have the right to acquire an effective remedy in a national court against national measures which they claim to be contrary to Community law. The outcome of these three judgments is that individuals now have the right to request interim relief before national courts both in disputes concerning the compatibility of a national measure to Community law and in actions concerning the validity of a secondary Community measure. As it has been held such right derives from the fact that both cases are based on Community law itself¹⁷⁶.

In *Factortame* the European Court of Justice directed its attention towards the significance of interim relief as part of the system of effective judicial protection of individuals¹⁷⁷. Although the strict wording of the judgment states that the national court should set aside a national rule, which prevents it from granting interim relief, the importance of the judgment can be seen to be the recognition of the right of individuals to obtain interim relief, if it is required by Community law, even if national law does not empower national courts to do so. Whilst the judgment can be criticised for not indicating all the solutions to the new power of national courts to grant interim relief, it nevertheless reinforces the context of judicial protection of individuals’ Community law rights. The European Court of Justice acknowledged the need for national courts to ensure that the protection of these rights would not be deprived or frustrated by national legal systems. National courts can now rely on the Community legal order, when dealing with the protection of Community rights, in order to overcome obstacles of national law, which would otherwise threaten the effective protection of individuals¹⁷⁸. This is consequently the most important

¹⁷⁵ See *Atlanta*, *supra* n° 74, par. 28

¹⁷⁶ See *Zuckerfabrik*, *supra* n° 49, para. 20, *Atlanta*, *supra* n° 74, para. 24.

¹⁷⁷ El. Sharpston, *supra* n° 69, p. 48.

¹⁷⁸ A. Barav, *La plénitude de compétence du juge national en sa qualité de juge communautaire*, *Mélanges Boulois*, 191, p. 17

contribution that *Factortame* judgment makes for the judicial protection afforded to the individuals' Community rights¹⁷⁹.

After the preliminary ruling of the European Court of Justice on *Factortame*, it was made clear to the English court that it was a matter of national law to provide the criteria and the circumstances under which a court may grant interim relief¹⁸⁰. In cases where the compatibility of a national rule with Community law was at stake, applicable national procedural rules were subject to the limitations set out by the European Court of Justice. These limitations prescribe that procedural rules should not be less favourable than those for the enforcement of national law rights, nor should they be applied in a way that impedes any substantive exercise of an individual's Community rights¹⁸¹.

The House of Lords complied with the preliminary ruling and found no difficulty in applying the principles deriving from it¹⁸². It interpreted its existing national procedural rules and the criteria that it usually considered in cases for interim relief¹⁸³. Apparently the House of Lords relied on the criteria that would be acceptable from the majority of the member States in similar situations. Firstly the applicant had to demonstrate that there was a strong *prima facie* case, that national law was incompatible with Community law¹⁸⁴. Secondly the test employed by the House of Lords was whether an award of damages would be an adequate remedy when the issue is considered in the merits. Lord Goff of Chieveley ruled that according to *Bourgoin*¹⁸⁵ in cases where an authority is acting in the public interest, as in *Factortame*, no remedy in damages would be convenient if the Act was finally declared incompatible with Community law¹⁸⁶. Finally the court had to consider

¹⁷⁹ L. Papadias, *Interim Protection under Community Law before the National Courts. The Right to a Judge with Jurisdiction to Grant Interim Relief*, L.I.E.I., 1994/2, p. 178

¹⁸⁰ A. Tatham, *Les recours contre les atteintes portées aux norms communautaires par les pouvoirs publics en Angleterre*, (1993) C.D.E., p. 604

¹⁸¹ L. Papadias, *supra* n° 178, p. 189

¹⁸² C. Barnard and R. Greaves, *The Application of Community Law in the United Kingdom, 1986-1993*, (1994) 31 CML Rev., p. 1065; For a general analysis on the application and interpretation of EC law from English Courts: M. Andenas and F. Jacobs, *European Community Law in the English Courts*, Clarendon Press, Oxford, 1998

¹⁸³ *American Cyanamid Co v. Ethicon Ltd.* (1975) A.C. 396; See J. Martin, *Interlocutory Injunctions: American Cyanamid Comes of Age*, King's College Law Journal, (1993-1994), vol. 4, p. 52-53; C. Lewis, *Remedies and the Enforcement of European Community Law*, Sweet and Maxwell, 1996, p. 107

¹⁸⁴ *R. v. Secretary of State for Transport, ex parte Factortame Ltd and Others*, (1990) 3 C.M.L.R., p. 396 and 401

¹⁸⁵ *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food*, [1986] 1 C.M.L.R., 267

¹⁸⁶ See *Factortame Ltd and Others*, *supra* n° 183, p. 395

whether the balance of convenience would allow interim relief to be ordered¹⁸⁷. If the public authority is to apply the law of the land in the public interest, and the applicant is challenging the compatibility of that law, the court needs either to outweigh the desirability of enforcing the law and so justify the refusal of interim relief, or consider it just to preclude the public authority from enforcing the law for the time being, in order for the applicant to avoid any serious and irreparable harm from ensuring enforcement¹⁸⁸. According to the House of Lords, there was nothing to outbalance the obvious and immediate damage that would continue to be caused if no interim relief were granted to the applicants¹⁸⁹.

Following the judgment of the House of Lords in *Factortame* English courts¹⁹⁰ felt bound by this approach and in subsequent judgments they applied the principles established by the European Court of Justice in cases of interim relief. In particular in *Continental Television BV* the Court of Appeal confirmed that the Divisional court had correctly directed itself regarding the issue of whether it should adopt the approach indicated in *Factortame*. This established that the court had jurisdiction to grant an injunction in circumstances similar to that case¹⁹¹. In this case, the court held that the national judge was entitled to decide that the applicant's chance of success in having the contested act suspended is outweighed by the immediate public interest in upholding that act pending the European Court's ruling on the compatibility of the act¹⁹². In *British Telecommunications plc* it was held that the *Factortame* judgment given by the House of Lords was applicable in the present situation¹⁹³. The Court of Appeal ruled that the public interest outweighs the interests of the applicant who applied for the suspension of a national measure pending the European Court's ruling on its compatibility with the Community directive¹⁹⁴.

¹⁸⁷ J. Algazy, *The Crown, interim relief and EEC law*, (1991) N.L.J., p. 1303

¹⁸⁸ See *Factortame Ltd and Others*, *supra* n° 183,, p. 396

¹⁸⁹ *ibid*, p. 398. Lord Jauncey of Tullichettle held that "if the applicants are successful at the end of the day but are afforded no interim relief they will, standing the law as laid down in *Bourgoin*..., suffer very severe and irrecoverable damage. If they are ultimately unsuccessful but are afforded interim relief the loss suffered by the British fishing industry as a whole and by individual members thereof during the period of interim relief will be relatively minor.the balance of convenience favours the granting to them of interim relief", p. 406.

¹⁹⁰ See also *Coventry City Council v. Woolworths plc*, (1991) 2 C.M.L.R., p. 3

¹⁹¹ *R. v. Secretary of State for the National Heritage, ex parte Continental Television BV* (1993) C.M.L.R., 387, at p. 395

¹⁹² *Ibid*, p. 398

¹⁹³ *R. v. HM Treasury, ex parte British Telecommunications plc* (1994) C.M.L.R., p. 621

¹⁹⁴ *Ibid*, p. 649

Even if both cases confirm the European Court's judgment on the power of national courts to grant interim relief, still the discretion of national courts to do so lends itself to the practice of such courts safeguarding the public interest, without seriously interpreting the Community interest. Although national courts recognised their power to grant the suspension of a national measure, they were unwilling to accept that a possible breach of Community law was enough to outweigh the immediate enforcement of the contested national measure¹⁹⁵. As has been argued in relation to the British telecommunications Case, the Court of Appeal made use of the interim protection of Community rights but it did not explain why the protection of national law should take away the protection of Community law and why the doubts concerning the validity of a national measure benefits the safeguard of national law and not of Community law by ordering interim relief¹⁹⁶.

In *Zuckerfabrik* and *Atlanta* the focus of the European Court of Justice also turned to the interim protection of individuals before national jurisdictions. In both cases the European Court of Justice entrusted national courts with power to grant interim relief, since, according to the principle of effective protection, the enforcement of Community law is a matter of both European and national courts. The European Court saw the possibility of interim protection of individual rights as emerging from the right of the individual to judicial protection of his rights¹⁹⁷. It promoted the protection of individuals against unlawful Community legislation and placed their protection over the principle of primacy of Community law¹⁹⁸. Furthermore, the effective protection of individuals was improved, as the European Court of Justice left open the availability for a national court to grant interim relief even in a situation where it had already refused to grant such protection itself in previous proceedings before it under Article 230 (ex Article 173) EC Treaty. Therefore the dismissal of an application from a Member State concerning the validity of a Community regulation, and of the subsequent application for interim relief under Articles 242 and 243 EC Treaty, does not preclude the right of the interested individual to challenge the same regulation before national courts, nor to ask for a preliminary ruling from the European Court and obtain interim relief until such ruling

¹⁹⁵ A. Ward, *supra* n° 99, p. 28

¹⁹⁶ J. Cavallini, *Le juge national du provisoire face au droit communautaire. Les contentieux français et anglais*, Bruylant Bruxelles, 1995, p. 398

¹⁹⁷ T. Tridimas, *The General Principles of EC Law*, Oxford University Press, 1999, p. 305

¹⁹⁸ H.G. Schermers, *supra* n° 51, p. 137

is finally given¹⁹⁹. Furthermore, the *Atlanta* judgment reinforced the individual's protection by allowing the individual to apply for interim relief before national courts, even if he/she had already challenged the same regulation before the European Court of Justice and the application had been rejected as inadmissible²⁰⁰. The individual is now allowed to apply before national courts for interim relief against a Community measure, which he/she would not be able to challenge under the conditions of Articles 230 and 242-243 EC Treaty²⁰¹ before a national court. In principle, it should therefore be accepted that through *Zuckerfabrik* and *Atlanta* individuals enjoy a wider interim protection of their Community rights than they had done before.

The power of national courts to suspend the application of a national measure implementing a Community regulation (*Zuckerfabrik* judgment) and the power to grant all necessary interim measures regulating the legal relationships of the parties pending the European Court's ruling (*Atlanta* judgment), has been accepted, without argument, by a majority of Member States.

In the United Kingdom, in *Imperial tobacco ltd and Others*²⁰² the House of Lords asked whether the test for a national court hearing an application for interim relief should apply the criteria of national or Community law. Lord Slynn stated that if a directive was implemented in national law before the prescribed final date, any application for the suspension of the operation of the directive would be a matter of Community law and that the situation should be the same on an application for interim relief to prevent the directive being adopted. It is interesting though to mention that in the same case the Court of Appeal²⁰³ suggested that the absence of serious and irreparable harm should not be a factor pointing away from the grant of interim relief. This view was clearly not in conformity with the conditions laid down in *Zuckerfabrik* and *Atlanta*, where such damage needs to be established as a condition for ordering interim relief. It seems that the House of Lords accepted that all Community law conditions had to be satisfied, but created a leeway by stating that

¹⁹⁹ Case C-280/93 *Germany v. Council* [1994] ECR I-4973, Case C-280/93 *Germany v. Council* [1994] ECR I-3667

²⁰⁰ Case T-521/93 *Atlanta AG and Others v. Council*, [1996] ECR II-1707

²⁰¹ G. Bebr, *supra* n° 76, p. 808

²⁰² *R. v. Secretary of State for health and others, ex parte Imperial Tobacco ltd and Others*, [2001] 1 WLR 127

²⁰³ *v. Secretary of State for health and others, ex parte Imperial Tobacco ltd and Others*, [2002] QB 161

Zuckerfabrik and *Atlanta* conditions should be applied as a 'starting point'²⁰⁴, without excluding the possibility that such application is not absolute.

English courts dealt with the same issue in a more recent case (*ABNA Limited and Others*²⁰⁵) where individuals brought an application for judicial review challenging national administrative measures and they sought interim relief suspending these measures until the resolution of the proceedings. Six manufacturers of compound animal foodstuffs sought an order against certain parts of the Feeding Stuffs Regulations 2003 and applied for interim injunctions. The High Court referred a preliminary question to the ECJ under Article 234 EC Treaty on the validity of Council Directive 2002/2/EC. The court correctly acknowledged that for the granting of interim relief until the preliminary ruling is given by the ECJ, the principles established in EC law (*Zuckerfabrik and Atlanta*) would apply, as a matter of uniform application of EC law before all national courts. As long as the national administrative measure was based upon the Council Directive, the national court had to examine certain conditions that had to be met before granting interim relief. The court referred to the relevant cases of the ECJ but also mentioned the judgment of the Court of Appeal in *Imperial Tobacco Ltd*, where it was previously held that the principles established in Community law, and not in national law, must be applied in order to decide whether interim relief can be granted²⁰⁶. The High Court agreed that the applicants had to show that all conditions under Community law were satisfied. Through an extended analysis the High Court examined the serious doubts as to the validity of the Council Directive²⁰⁷ and the serious and irreparable damage to the applicants²⁰⁸, and took due account of the Community interest. It concluded that by reference to the conditions set out and explained in *Zuckerfabrik* and *Atlanta* interim relief should be granted²⁰⁹. Although this judgment illustrates the willingness of English Courts to apply the Community law conditions for interim relief, it is not clear whether this will always be the case in future applications. The High Court held that there could be exceptional cases where interim relief could be granted even if the

²⁰⁴ *Ibid.*, p. 132

²⁰⁵ *R (ABNA Ltd, Denis Brinicombe (a partnership), BOCM Pauls Ltd, Devenish Nutrition Ltd, Nutrition Services (International) Ltd, Primary Diets Ltd) v. Secretary of State for Health and Food Standards Agency* [2004] EULR 88

²⁰⁶ *Ibid.*, p. 98C

²⁰⁷ *Ibid.*, p. 103G-109B

²⁰⁸ *Ibid.*, p. 109C-112B

²⁰⁹ *Ibid.*, p. 115C

Community law conditions were not all fulfilled²¹⁰, as the national courts have the power to exercise their discretion when considering the facts of a particular case.

In Germany, litigation regarding the common organisation of the market in bananas gave rise to a number of decisions concerning the suspension of the application of certain provisions of the rules. On 9 January 1996 the Bundesfinanzhof confirmed the interim measures ordered by the Finanzgericht Hamburg in relation to an application for the suspension of the duty on a certain quantity of bananas imported without license²¹¹. It took the view that interim relief was justified owing to doubts concerning the applicability of Council Regulation No 404/93.

Finally, in the Netherlands in 1995 the Commercial Court suspended the application of Commission Decision 95/119/EC by applying the conditions and criteria provided in *Zuckerfabrik* judgment²¹². Even if the case concerned a Commission decision and not a regulation, the Dutch court concluded that there were serious doubts as to the validity of the contested Community measure and suspended it.

This brief but indicative selection of national judgments proves the willingness of national courts to apply Community law principles, even where there are restrictions and limitations in the Member States procedural rules²¹³. National courts make use of their power to grant interim relief in order to ensure that individuals' rights are effectively secured. Although national courts have been reluctant to accept, without argument, the impact of the *Factortame* and *Zuckerfabrik/Atlanta* principles in their judicial systems, they still justify their new jurisdiction to grant interim relief through Community law, and exercise this power in their national legal order by applying conditions and criteria deriving from the European court's judgments.

Although in principal it is accepted that the subsequent judgments of the European Court of Justice reinforced the judicial protection of individuals before national jurisdictions, further analysis might dispute whether such aim has been effectively achieved. An examination should be made of the application of the principles provided in the relevant judgments on the individual's attempt to grant interim relief before national courts. Advocate General Leger in *Hedley Lomas*

²¹⁰ *Ibid.*, p. 103F

²¹¹ N. Reich, *Judge-made 'Europe à la carte': Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation*, EJIL, Vol. 7 (1996) No. 1, p. 109

²¹² *Affish B.V. v. Rijksdienst voor de keuring van Vee en Vlees*, Ab 1995, no 443. See the 13th Annual Report on Monitoring the application of Community Law (1995), OJ COM (96) 600, p. 424

²¹³ L. Papadias, *supra* n° 178, p. 191

observed that, with regard to the imposition of EC interim relief rules on the national legal order, it has been more difficult to obtain temporary protection before Member State courts²¹⁴.

In *Factortame* the minimalist approach adopted by the European Court of Justice did not provide all the necessary guarantees for the individual's protection. When the case came before the English courts for the second time after the preliminary ruling was given, the House of Lords respected the ruling and granted interim relief applying the conditions of English law²¹⁵. However Lord Goff emphasised that "the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, *prima facie*, so firmly based as to justify so exceptional a course being taken"²¹⁶. Such statement, even if the House of Lords followed the European Court's ruling, shows the lack of safeguards for any future application of individuals for interim relief against a public authority. The European Court of Justice did not specify the criteria for such interim relief and therefore the matter was left to the national jurisdictions' discretion. With regard to applications concerning Community law, individuals acquired a power that they previously did not possess, namely, to suspend the application of an Act of Parliament while challenging its compatibility with Community law. But in purely national law cases, individuals were prevented from such protection as the common law rule refrained them from applying for the suspension of such Act²¹⁷. Such differential treatment cannot be considered as promoting the effective protection of individuals' rights²¹⁸. In a national level the effect of the *Factortame* judgment was to create a low success rate of applicants who have subsequently sought to rely on the case to obtain interim relief²¹⁹. At a Community level the *Factortame* judgment laid the foundations for a right to grant interim relief before a national jurisdiction, but the lack of uniform conditions for doing so, placed the protection of individuals'

²¹⁴ Case C-5/94, *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553

²¹⁵ *Regina v. Secretary of State for Transport, ex parte Factortame Ltd and Others*, [1990] 3 C.M.L.R., p. 375

²¹⁶ *Ibid* p. 396

²¹⁷ G. Aldous and J. Alder, *Applications for judicial review*, 1993, Butterworths, p. 148

²¹⁸ See T. Tridimas, *supra* n° 196, p. 304, who describes this treatment as unsatisfactory leading to reverse discrimination in the procedural plane.

²¹⁹ A. Ward, *Judicial Review and the Rights of Private Parties in EC Law*, Oxford University Press, 2000, p. 27

Community rights at a precarious position, dependant on the different national procedural systems. Interim relief for putative Community rights was still subject to the national court's willingness to give preference to the effective application of Community law rather than to the application of a national measure, whose compatibility with Community law was being challenged.

It is probably this uncertainty that urged the European Court of Justice to introduce changes in the substantive rules on interim relief before national jurisdictions. In *Zuckerfabrik* and *Atlanta* the European Court of Justice demonstrated its intention to move towards the adoption of a Community standard for the interim protection of Community rights. The conditions set out in the two subsequent judgments, however, illustrate the difficulties that individuals will still face when applying for interim relief.

The conditions were already strict since their first appearance in the *Zuckerfabrik* judgment. In addition, in *Atlanta* the European Court of Justice has tightened the criteria required in a way that would make interim relief particularly difficult for an individual to acquire²²⁰. It considered the issue with a higher level of severity giving the impression of taking back what it had previously offered²²¹.

Firstly, it requires from national judge to prove that there are serious doubts as to the validity of the contested Community Regulation. It is especially difficult to imagine how the national judge in proceedings of interim relief would be able to analyse all serious doubts without prejudging the substance of the case. The European Court of Justice demands the national court to include in its reference all its conclusions with a high level of certainty on the validity of the contested measure. Comparing this condition with the analogous criteria in an application for interim relief under Articles 242 and 243 EC Treaty, it is obvious that the European Court of Justice introduced the obligation to show serious doubts, not in favour of the individuals, but in order to safeguard the uniform application of Community law. In interim proceedings before the European Court of Justice the judge is required to examine the factual and legal grounds of the main case. It has been held though that it is sufficient for the judge to proceed to the grant of interim relief even if the examination of the main action does not convince him or her of the success of the

²²⁰ El. Sharpston, *supra* n° 69, p. 54

²²¹ R. Medhi, *supra* n° 82, p. 94

applicant but just presents such possibility as probable²²². However, in *Zuckerfabrik* and *Atlanta* the European Court of Justice, even if it stated that the conditions should be analogous to Articles 242 and 243 EC Treaty, imposed a more demanding conception of *fumus boni juris*²²³. It imposed an obligation on the national court to demonstrate “serious” doubts as to the validity, and not just to be persuaded that there is a serious dispute, or that there is a chance of success. The European Court of Justice tried to take every precaution in order to guarantee the enforcement, and application, of a Community measure, and to avoid the adoption of interim measures, which would jeopardise the Community legal system.

Secondly, principal objective of the European Court of Justice was not the individual’s interim protection. Although it increased the possibilities of an individual to challenge the validity of a Community measure before national courts, it insisted on a high level of proof from the applicant²²⁴. The burden of proof is placed on the individual, who needs to show the specific situation that differentiates him from other operators in order to stand a chance of receiving interim protection.

Finally, the European Court of Justice paid much of attention to the Community interests and from this it is evident that the balance has swung against the protection of individual rights. The national court has to estimate the cumulative effect that a possible grant of interim relief may have, if other national courts follow the same proceedings²²⁵. It is questionable how far the national court would be able to assess such effect, and balance it with the need to protect individual rights²²⁶. This restrictive condition has only one purpose; to restrain individuals from acquiring interim relief and to reinforce the uniform execution of Community law, which can be overturned only in situations where the illegality of a Community act is of no doubt²²⁷.

However, since the European Court of Justice acknowledged such power of national courts and tried to formulate the criteria of how to exercise it, it has not stopped dealing with more specific issues of interim protection of individual Community rights before national courts. In *T. Port*²²⁸ the European Court of Justice was asked whether national courts had the power to grant interim relief in a case

²²² See chapter II where there is an analysis of the prima facie condition for interim relief

²²³ R. Medhi, *supra* n° 82 *supra* n° 69, p. 95

²²⁴ See *Atlanta*, *supra* n° 74, para. 44 and 49

²²⁵ See *Atlanta*, *supra* n° 74, para. 44

²²⁶ G. Bebr, *supra* n° 76, p. 802, El. Sharpston, *supra* n° 69, p. 54

²²⁷ R. Medhi, *supra* n° 82, p. 96

²²⁸ Case C-68/95, *T. Port GmbH v. Bundesanstalt für Landwirtschaft und Ernährung* [1996] ECR I-6065

where, by virtue of Community regulation, the existence and scope of the applicant's rights must be established by a Commission measure, which has not yet been adopted. The particular case had to be distinguished from *Zuckerfabrik* and *Atlanta* as it was not concerned with the interim protection of Community rights, in the context of a national measure implementing a Community Regulation whose validity was being challenged. The European Court of Justice held that "national courts have no jurisdiction to order interim measures pending action on the part of the institution", as only the European Courts could provide judicial protection to the individual concerned in such situations²²⁹. The Treaty does not empower the national court under Article 234 EC Treaty to ask the European Court of Justice to rule that an institution has failed to act. However, the European Court acknowledged the different remedies that the individual could use in order to protect his rights. It might have denied the right to obtain interim relief before national courts in a case where a measure from a Community institution needs to be adopted, but it was willing to protect the individual by reinforcing his position in actions brought before it²³⁰. Of particular importance is the reference to the right of an individual to bring an action for failure to act against an institution under Article 175 EC Treaty, if individual and direct concern is shown²³¹. Subsequently in proceedings for the failure to act, the applicant in *T. Port* could apply under Articles 185 and 186 EC Treaty for the adoption of interim measures. However, it can be said that in *T. Port* the European Court of Justice missed a golden opportunity of ensuring that individual applicants could have access to a coherent system of judicial protection without any gaps²³². The judgment brought the action of annulment and the action for failure to act closer by unifying the conditions applicable to individuals. But it remains unconvincing as to why individuals can indirectly challenge the legality of a Community measure and possibly obtain interim relief, whilst no similar remedy before national courts is afforded if a Community institution has failed to act. Had the Court of Justice allowed the national courts to refer a preliminary question on the failure of a Community institution to act, interim protection of individuals' rights could be awarded.

²²⁹ Ibid, par. 53-54

²³⁰ T. Tridimas, *supra* n° 196, p. 311

²³¹ See *T. Port*, *supra* n° 219, para. 58

²³² A. Albors-Llorens, note on Case C-68/95, *T-Port GmbH and Co. KG v. Bundesanstalt für Landwirtschaft und Ernährung*, [1996] ECR I-6065, (1998) 35 CML Rev., p. 243

In *Krüger* the European Court of Justice clarified an issue concerning the national court's task to take due account of the Community interest, when dealing with the grant of interim relief²³³. Referring to the conditions established in *Atlanta* the European Court of Justice held that it was for a national court, when assessing the Community interest, to decide, in accordance with its own rules of procedure, which was the most convenient way of obtaining information on the contested Community measure²³⁴. However, the Commission proposed that in such situations the relevant Community institution should have the right to express its views before the national court on the validity of the contested measure. This approach would complicate the summary proceedings of interim relief²³⁵. However, the European Court of Justice should not leave the matter to the complete discretion of the national court, as the latter could easily ignore fundamental information and jeopardise the effective protection of the applicant's Community rights. In addition, the national judge cannot yet be considered the best server of the Community interest, as he still tends to show preference for preserving national measures pending the European Court's ruling on the validity of the contested act. The approach adopted does however show the European Court's intention to entrust wide powers and discretion to the national courts, considering them as an indispensable part of the process for more effective protection of Community individuals.

However it is questionable whether the judgment in *Krüger* can be considered a wider principle adopted by the ECJ, applicable to all applications for interim relief before national courts. In particular, for the purpose of this analysis it is essential to examine whether the European Courts would adopt the same approach, when the Commission is willing to make submissions in national courts, when there is an application for interim relief in competition cases.

According to the enforcement regime of EC competition rules national courts have an essential part to play in applying the Community competition rules. When deciding cases between private parties, national courts have to protect the rights deriving from Community competition law, and provide all available remedies and procedures in order to ensure the effective protection of these subjective rights²³⁶. In

²³³ Case C-334/95 *Krüger v. Hauptzollamt Hamburg-Jonas* [1997] ECR I-4517

²³⁴ *ibid*, par. 46

²³⁵ T. Tridimas, *supra* n° 196, p. 310

²³⁶ Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1, [2003] 4 CMLR 551. In particular Article 6 of

competition cases between private individuals, national courts may award damages to the innocent undertaking for infringements of Articles 81 and 82 EC Treaty. Member States have the obligation to provide a remedy for damages where there has been an infringement of the competition rules²³⁷. Furthermore when a national court decides to stay proceedings until the Commission has decided on the infringement of Articles 81 and 82 EC Treaty, or until the ECJ has given a preliminary ruling under Article 234 EC Treaty, it has the power to order interim measures in order to protect provisionally the interests at stake. Although such power is not expressly provided in Regulation 1/2003, the Commission referred to it in its Notice on the co-operation between the Commission and the national courts in the application of Articles 81 and 82 EC²³⁸. Therefore in the absence of Community law rules on procedures and remedies to the enforcement of EC competition rules by national courts, the latter will apply national procedural rules and provide remedies, i.e. interim relief, under national law and in conformity with the principles of effectiveness and equivalence. It is interesting to mention that national courts will apply EC competition rules, as a matter of EC law, in cases where trade between Member States will be affected, and provide under national law all available remedies, including interim relief, in order to effectively protect the rights deriving from Articles 81 and 82 EC Treaty. On the power of national courts to order interim relief in competition cases the Commission's view has been that interim measures may be more easily and quickly obtained in national courts, than from the EC Institution itself²³⁹.

Under the enforcement system of Regulation 1/2003 national courts are going to play an important role to the interim protection of individuals. The latter can only apply for interim measures before the national courts and not any more before the Commission, as they used to do according to the judgment of the ECJ in *Camera Care v. Commission*²⁴⁰. Regulation 1/2003 has clarified this position. A power to grant interim relief has been explicitly given to the Commission but with important limitations. Firms who feel threatened by a suspected anticompetitive behaviour may

Regulation 1/2003 states that 'National courts shall have the power to apply Articles 81 and 82 of the Treaty'.

²³⁷ Case C-453/99 *Courage Ltd v. Crehan* [2001] ECR I-6297. See R. Whish, *Competition Law*, Fifth Edition, Lexis Nexis, Butterworths, p. 297-302, V. Korah, *An Introductory guide to EC Competition Law and Practice*, Hart Publishing, Eight Edition 2004, p. 218

²³⁸ Commission notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ [2004] C 101/04, para 14

²³⁹ Co-operation Notice, OJ [1993] C 39/6, para. 16

²⁴⁰ Case 792/79R *Camera Care v. Commission* [1980] ECR 119

no longer apply for interim relief before the Commission. The Commission is empowered to act only 'on its own initiative' and interim measures will be granted where necessary due to the risk of serious and irreparable damage to competition²⁴¹. This seems to limit the award of interim relief to a public interest requirement. Therefore individual undertakings will have recourse only to national courts, the function of which will be to examine whether the award of interim relief is necessary to safeguard the interests of the parties. Experience though has shown that national courts, more specifically in the UK, have been hesitant to grant interim relief in competition cases, as it was concluded that damages would be an adequate remedy for the innocent undertaking²⁴².

Under Article 15(3) of Regulation 1/2003 the Commission can on its own initiative make oral or written submissions to the national courts, before which there is a case based on Articles 81 and 82 EC Treaty. The specific article does not refer expressly to proceedings of interim relief before national courts. It still remains unclear how such power to make submissions can be exercised in summary proceedings of interim relief, following the ruling on *Krüger*²⁴³.

The nature of interim relief dictates that any kind of intervention of a Community Institution could create complications to the summary proceedings. Although such principle, as stated in *Krüger*, seems to be justified by the very nature of interim relief, it needs to be reconsidered when national courts deal with cases based on Articles 81 and 82 EC Treaty. This reconsideration is based on the particular dominant role that the Commission has in the enforcement system of EC competition rules. First, Regulation 1/2003 provides that national courts cannot take any decisions which could be in conflict with a decision already taken by the Commission, or even a decision contemplated by the Commission in case before it²⁴⁴. This limitation illustrates that the national courts are not only cooperating with the Commission for the uniform application of EC competition rules, but they are also in an inferior position, obliged to make a decision which does not run counter to a Commission decision. Furthermore the Commission can still change its mind and not be bound by

²⁴¹ Article 8 of Council Regulation 1/2003, *supra* n° 228

²⁴² See *Garden Cottage foods v. Milk Marketing Board* [1983] 3 CMLR 43, *Argyll Group plc v. Distillers Co plc* [1986] 1 CMLR 764, *Cutsforth v. Mansfield Inns* [1986] 1 CMLR 1, *ECS/AKZO* [1983] 3 CMLR 694

²⁴³ Case C-334/95 *Krüger v. Hauptzollamt Hamburg-Jonas* [1997] ECR I-4517

²⁴⁴ Article 16 and Recital 22 of Council Regulation 1/2003, *supra* n° 228

a previous judgment of a national court²⁴⁵. These restrictions imposed on national courts as well as these powers of the Commission should also apply in proceedings for interim relief, where the national courts will have to make sure that its decision will not be in conflict with an existing or future Commission decision. As long as the Commission will be able to overrule the national court's decision in the future, it would be wiser to allow the Institution to make its observations and submissions on time (even in interim relief proceedings), so that the national court can take a decision that would be more effective for the parties, would safeguard the uniform application of EC competition law and would ensure the principle of legal certainty.

Secondly, apart from the Commission's dominance in the competition policy, as illustrated in the Treaty and in Regulation 1/2003, it is essential to state what kind of interests is the Commission acting for under the enforcement regime of Competition law. This is important as in proceedings for interim relief the national courts have to take due account of the Community interest. The Commission acts in the public interest and not in the interest of individual undertakings. This is clearly stated in Regulation 1/2003, where the Commission is empowered to order interim relief only where it is necessary to avoid a risk to *competition*. The Commission has the task to safeguard competition within the common market and is not acting in order to safeguard specific undertakings. The latter is a task given to national courts. The Commission as the executive arm of the EU is enforcing EC competition policy, and it is clear that it has extended powers in order to achieve that effectively. When proceedings start before national courts, the Commission is not left out. It might not be able to relieve the national court from the case as it may do so with the national competition authorities under Article 11 of Regulation 1/2003, but it can still intervene and support the Community interest under Article 15(3). Therefore the wording of Article 15(3) of Regulation 1/2003, which allows the Commission to make submissions, even on its own initiative, in national courts and the particular task that this Institution has to protect competition as a Community interest, dictate that the Commission's views should be heard in interim relief proceedings before national courts.

Although the Commission's intervention to national proceedings is justified from the very nature of the competition policy and the specific legislation adopted for

²⁴⁵ Case C-344/98 *Masterfoods Ltd and HB Ice Cream v. Commission* [2000] ECR I-1136

its effective enforcement, such power should not be unlimited. The Commission has to respect the summary nature of interim relief proceedings and make sure that its submissions would not jeopardize or complicate the procedure. This power should be exercised with caution. Submissions should be kept short and made on time. Submissions should be accepted by the national courts in situations where the Commission shows that it would have ordered, on its own, interim relief if it was investigating a case before it; or at least where the Commission argues that the particular competition case is of great important for the common market. National courts should be willing to receive the Commission's view in competition cases as they are not only cooperating but also depending on the Commission.

In *Emesa Sugar* the Dutch Court asked the European Court of Justice if it had the power, under Community law, to grant interim relief against a non-Community authority responsible for applying Community law²⁴⁶. The European Court of Justice answered in the affirmative and referred to *Zuckerfabrik* in relation to the criteria required for the grant of such interim relief. As a final remark the European Court of Justice held that the fact that such interim measures would be ordered vis-à-vis an authority of an OCT by a national court, in accordance with its national rules, is not such as to affect the conditions under which the temporary protection of individuals must be guaranteed when the case concerns Community law²⁴⁷. In other words, in circumstances where Community law does not allow the grant of interim relief, if national procedural rules would do so in relation to a national measure, the conditions ensuring the interim protection of individual rights before national jurisdictions would not be affected²⁴⁸. The European Court of Justice is implying that Community principles of interim relief become essential for the effective protection of individuals before the national courts. However the wording in *Emesa* makes it clear that the provisional protection of individuals becomes more difficult, since Community rules on interim relief have been imposed on national legal systems. In cases where the individual was able to obtain interim measures in accordance with national law, he/she might now have to face the refusal of such protection, if the conditions of Community law are not fulfilled.

²⁴⁶ Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba* [2000] ECR I-675

²⁴⁷ *ibid*, para. 70

²⁴⁸ A. Ward, *More than an "Infant Disease": Individual Rights, EC Directives, and the case for Uniform Remedies*, in *Direct Effect Rethinking a Classic Of EC Legal Doctrine*, edited by J.M. Prinssen and A. Schrauwen, Europa Law Publishing, 2002, p. 67

Consequently, it can be argued that the European Court of Justice primarily aims at safeguarding the full, and uniform, application of Community law, and only subsequently at the judicial protection of individual rights. In *Factortame* it was concerned with the non-application of a national law and the protection of rights deriving from Community law. In *Zuckerfabrik* and *Atlanta* it aimed solely for the conditional suspension of the application of Community law. This primacy of the full application of EC Law is further evidenced since the European Court of Justice does not oblige the national judge to grant interim measures against any national measure implementing a Community Regulation. The national court's power to grant interim relief does not oblige it to enable all individuals to contest a Community measure before it²⁴⁹. Where the interim protection of individuals' rights is guaranteed, it seems more as an ancillary, and incidental effect, ensuing from the principal objective of full, and effective, application of Community law.

²⁴⁹ P. Oliver, *Interim Measures: Some recent Developments*, (1992) 29 CML Rev., p. 23

CHAPTER V**THE EFFECTIVENESS OF THE SYSTEM OF INTERIM PROTECTION OF INDIVIDUALS UNDER EC LAW****V.1) Introduction**

Although interim relief proceedings have been extensively analysed before the European Courts, and it has been accepted that they have their own purpose and conditions, the impact of granting interim measures in any given form is still closely related to the more general issue of effectively protecting individuals' rights deriving from Community law. Interim relief forms part of the judicial system provided by the EC Treaty, which established a complete system of remedies and procedures to control the legality of EC measures and protect the applicants' rights deriving from them. Concentrating on the main purpose the interim relief as a mechanism to protect putative rights conferred on individuals, it is essential to examine whether this goal has been achieved through the provisions of the EC Treaty and the judgments given by the European Courts.

In the previous chapters there has been extensive analysis of the cases and the interpretation of the European Courts on the issue of interim protection before the Community and national jurisdictions. However, the ancillary nature of interim relief, its admissibility depending upon the previous application for an action of annulment of the contested Community measure, as well as the obligation of national courts to refer a preliminary question to the European Court of Justice before granting interim relief, urge us to examine the effectiveness of the judicial protection of private parties in a wider concept. More precisely, on the one hand interim relief is related to the position of the individual in direct actions before the European Courts. An application for interim relief under Articles 242 and 243 EC Treaty depends upon the locus standi of the applicant for his previous challenge to annul the contested Community measure. In the situation, where the action of annulment under Article 230 EC Treaty is rejected as inadmissible, the individual has no right to request the grant of interim relief. Although this structure of the judicial system of the EC Treaty seems to be coherent with the ancillary nature of interim relief, the strict conditions applied to

private applicants under Article 230 EC Treaty create doubts with regard to the effectiveness of the judicial protection of his/her Community rights.

Private parties have the right to challenge Community measures before national jurisdictions and therefore apply for interim relief before them. However, proceedings before national courts cannot guarantee the effective judicial protection of individual rights. Even if the European Court of Justice has ruled that an individual must have access to a remedy against a Community measure in order to obtain judicial protection¹ and, furthermore, has recognized the power of national courts to grant interim relief for the applicant's protection², individuals seeking to challenge the validity of a Community measure before national jurisdictions are still not granted fully effective judicial protection and their interim protection is limited by strict conditions.

Hence the paradox of the current position of the individual applying for judicial protection either challenging a Community measure and/or requesting interim relief can be summarized as follows: the European Courts have acknowledged the right of an individual to request protection of his Community rights either before them or before the national courts without achieving a level of effectiveness which can be considered capable of guaranteeing that they are going to be granted full judicial protection. The principle of effective judicial protection has been repeatedly mentioned in judgments of the European Courts³, but in my view it has not yet reached the desirable result for the promotion of the position of an individual applicant concerned for his rights derived by Community law.

It should therefore be accepted that there is a need to reconsider the effective judicial protection of individuals within the judicial system established by the EC Treaty and in the light of the previous judgments of the European Courts. This process will be undertaken in several steps in order to come to a solid conclusion. First, there has to be an examination of the current position of the individual parties before the European Courts within the structure of the relevant EC Treaty Articles. The question is whether direct actions challenging Community measures, the limitations and conditions imposed from the Community legislation as well as the

¹ Case C-97/91 *Borelli* [1992] ECR I-6313

² See Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Suderdithmarschen* [1991] ECR I-415, Case C-465/903 *Atlanta Fruchthandelsgesellschaft* [1995] ECR I-3761

³ Joined Cases C-46 and C-48/93 *Brasserie du Pecheur v. Germany and the Queen v. Secretary of State for Transport, ex parte Factortame Ltd.* [1996] ECR I-1029

interpretation of the European Courts, are consistent with the principle of effective judicial protection.

Second, the case law on the right of individuals to grant remedies before national courts capable of protecting them against unlawful Community measures has to be analysed. The limited competence of national courts in cases related to the validity of Community measures as well as the close relationship of this competence with proceedings for preliminary rulings under Article 234 EC Treaty present serious difficulties as to the effectiveness of the individual's protection.

The third step outlines the clear distinction between cases concerning the validity of Community measures and cases related to the compatibility of national measures with Community legislation. The question is whether the European Courts are more appropriate for cases on the validity issues, leaving the national courts to play a more important role in cases concerning the interpretation and application of Community law. In addition, it has to be examined whether the preliminary ruling proceedings can provide full and effective protection of individual rights at a level similar to that of direct actions before the European Courts.

Finally, there has to be a relaxation of the conditions related to the individual's right to challenge Community measure, either directly before European Courts, or indirectly before national jurisdictions. On the one hand, there has been a considerable weight of jurisprudence concerning the loosening of the condition of individual concern of Article 230 EC Treaty. On the other hand, the conditions concerning remedies before national courts remain strict. In my view, only a parallel relaxation of the access to both jurisdictions could result to the effective protection of the individual's rights. The right to obtain interim relief would become more effective if the system of judicial protection within the Community provides substantive guarantees that, in both jurisdictions, the protection of putative rights has some practical substance rather than forever remaining an illusory goal.

V.2) The European and national courts' role in the effective protection of individuals' EC rights

First, the national courts, acting as Community courts, have the duty to confer effective protection on individuals claiming rights deriving from Community law. National courts play an important role in the application and enforcement of

Community law and therefore individuals should be able to contest the national measures taken in the execution and application of Community measures as adopted by the relevant Community institutions⁴. It is easier for an individual applicant to access the national judge, who will ask for the co-operation of the Court of Justice if there is a need for interpretation or examination of the validity of a Community measure in order to give effective judgment in the case⁵. Furthermore, accessing the national courts in order to solve problems deriving from Community law would contribute to the effective interaction of national and European authorities for the development of the Community law of individuals. This remark justifies the potential relaxation of standing rules for direct actions of individuals before European Courts. The possibility that individuals will be able to challenge directly all binding Community measures does not necessarily result in the limitation of the fundamental role of national courts. It is still those courts, who through the preliminary reference procedure will bring before the Court of Justice the questions which will enable the development of fundamental principles and doctrines for the proper function of the Community legal order. In addition, national courts will still be the appropriate courts to apply the answers given by the Court of Justice in its preliminary rulings⁶.

Secondly the fact that national courts do not have jurisdiction to declare a Community measure invalid can be effective for the protection of individuals. The European Court of Justice is in a better position to make such review than national courts, which do not have all the relevant information at their disposal. As has been argued, the exclusive competence of the Court of Justice to declare a Community measure invalid will ultimately strengthen the legal protection of individuals⁷. Any presumed infringement of fundamental rights will immediately oblige the national court to request a review of the contested measure from the Court of Justice. In addition, individuals can make use of their right to appeal in the event that the national court does not respect its obligation to refer for a preliminary ruling.

Although there has been a large number of cases dealing with the effective protection of individuals before the European Courts and a developing one on the

⁴ G. Bebr, *The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty (Cases 314/85 and 133 to 136/85)*, (1988) 25 CML Rev., p. 667

⁵ P. Nihoul, *La recevabilité des recours en annulation introduits par un particulier a l'encontre d'un acte communautaire de portée générale*, (1994) R.T.D.E., p. 171

⁶ A. Arnall, *The European Union and its Court of Justice*, Oxford University Press, 1999, p. 561

⁷ G. Bebr, *supra* n° 4, p. 681

principle of effective protection before national jurisdictions, the key issue for the European judicature is the problem of how to provide the individual applicant with the maximum possible number of remedies for him to protect his rights irrespective of whether this is going to happen on a European or national level. The relaxation of locus standi rules under Article 230 (4) EC Treaty would provide the individual with wide access to the European judicature in order to challenge any Community measure, which adversely affects his rights. With a new regime of standing requirements, the protection on Community level would improve and achieve its goal of being effective. The situation before national jurisdictions would provide individuals with the right to request a reference to the Court of Justice on validity issues. Individuals would be able primarily to challenge the Community act before the European Courts, a result, which should be widely complied with. Individuals would still be able to indirectly challenge the validity of Community measures before national courts through Article 234 EC Treaty, but they would also have a more effective remedy to challenge it directly. This conclusion, in my view, would definitely improve the position of individuals. Although there might be a large concentration of actions before the Court of First Instance, individuals will be in a better position, as the Court of First Instance will be able to switch its emphasis from pure questions of admissibility to questions of substance. On the one hand, respecting the time-limit of Article 230 EC Treaty they will claim the validity of all binding EC measures. On the other hand, they will be able to challenge any national measure implementing a Community measure and indirectly if no direct action has been brought before the CFI to challenge the validity of the Community measure. Under this system of judicial protection, the *TWD* case law⁸ will be more effective. According to this case law, an individual cannot challenge a measure via Article 234 EC Treaty where, although there was no doubt about his standing under Article 230(4) EC Treaty, he omitted to take action within the time-limit laid down in Article 230(5) EC Treaty. The national court would not have any real difficulties in examining whether the applicant met the locus standi requirement. However, as has been argued, individuals will still be able to indirectly challenge the validity of general Community measures, even if they have not brought an action for annulment in the time prescribed under Article 230(4) EC Treaty, as this restriction of TWD

⁸ Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833

case-law does not normally extend to general measures⁹. It is up to the individual to choose which proceedings he considers more effective for the protection of his rights. Restrictions on this opportunity will occur when the procedural choice of the litigant amounts to an abuse of process and the resulting delay is likely to cause genuine prejudice to third parties or to the public interest¹⁰.

V.3) The “effective” interim protection of individuals in the EC legal order

V.3.A) *Interim relief before the European Courts*

The Court of Justice has confirmed that one of the constitutional elements of the Community was the right of access to justice and therefore the Treaty has established a complete system of remedies and procedures designed for the European Courts to control the legality of Community measures¹¹. However in the context of judicial review of the legality of Community measures before European Courts, individuals continue to be confronted with a number of obstacles in order to secure effective protection of their rights¹². Recently Advocate General Jacobs stated that such a restrictive attitude towards individual applicants which the Court has adopted in the context of Article 230(4) EC Treaty appears difficult to justify in the light of the generous view taken when considering other issues of Article 230 EC Treaty¹³. Even if there has been a significant improvement to the field of remedies and procedures for the protection of individual rights before national jurisdictions, the same cannot be asserted for the positions of individual parties when bringing actions before the European Courts. According to this principle, national courts are required to ignore national legislation and even grant individuals standing to bring actions, even if

⁹ See Opinion of AG Jacobs in Case C-50/00 P *Union de Pequeños Agricultores v. Council*, [2002] ECR I-6677, delivered on 21 March 2002, para. 65

¹⁰ D Wyatt QC, *The Relationship between Actions for Annulment and References on Validity after TWD Dewggendorf*, in *Remedies for Breach of EC Law*, edited by J. Lonbay and A. Biondi, 1997, Ch. 6, p. 55

¹¹ See Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339

¹² A. Ward, *Amsterdam and Amendment to Article 230: an opportunity lost or deferred?*, in *The Future of the judicial system of the European Union*, edited by A. Dashwood and A. Johnston, Hart Publishing, 2001, p. 38

¹³ See Opinion of AG Jacobs on Case C-50/00P *Union de Pequeños Agricultores v. Council*, [2002] ECR I-6677, delivered on 21 March 2002

national law would prohibit such right¹⁴. Given that the effective judicial protection has been a fundamental right of the Community legal order and has urged Member States to comply with it, it is unreasonable why the European Courts avoid adopting such an approach where individuals bring actions against Community institutions and their adopted measures¹⁵. Under the principle of effective judicial protection it is convenient to examine whether the individual is empowered with effective remedies to bring actions before the European Courts, the only competent jurisdiction to adjudicate the legality of a Community measure.

As has been previously analysed in Chapter II of this thesis, the proceedings for interim relief are of an ancillary nature. This emerges clearly from Articles 242 and 243 (ex Articles 185 and 186) EC Treaty, which permit the suspension of the “contested act” and allow only the grant of interim measures in cases before the European Courts. Accordingly, the Rules of Procedure of the two European Courts provide that an application for the suspension of a Community measure shall be admissible only if the applicant is challenging its validity in the main proceedings, and that an application for the adoption of any other interim measures must be made by an individual who is the applicant in the pending case and related to it¹⁶. In principle, an application for interim measures may be made after any direct action has been brought before the European Courts, and thus its success depends upon the admissibility of the direct action.

Therefore in a situation where an individual brings a direct action (action of annulment) before the European Courts and subsequently applies for the grant of interim relief, the issue of the strict conditions under Article 230(4) EC Treaty will arise again, pending the judgment on the legality of the contested measures, especially in the case of Regulations and Directives¹⁷. The effectiveness of interim protection is closely related, and depends upon, the effectiveness of the right of the individual applicant to bring a direct action before the European Courts. Such connection can be seen through the parallel examination of the European Courts’ approach to cases dealing with direct actions and applications for interim relief brought before them by individual parties.

¹⁴ Eg Case 222/84 *Johnston* [1986] ECR 1651, Case 222/86 *UNECTEF v. Heylens* [1987] ECR 4097, Case C-213/89 *Factortame* [1990] ECR I-2433

¹⁵ A. Ward, *Judicial Review and the Rights of Private Parties in EC Law*, Oxford University Press, 2000, p. 244

¹⁶ ECJ Rules of Procedure, Art. 83(1); CFI Rules of Procedure, Art. 104(1)

¹⁷ A. Ward, *supra* n° 15, p. 254

The conditions which individual parties must satisfy in order to bring an action of annulment under Article 230 (ex Article 173) EC Treaty are notoriously strict¹⁸. With regard to the two months time limit provided in Article 230(5) EC Treaty the European Courts have not given any interpretative guidance that is helpful to private parties¹⁹. In particular, the time limit is considered to be mandatory and is a matter of public policy intended to secure the legal positions and to avoid any discriminatory treatment to the award of justice. In addition, private applicants are prevented from raising a plea of illegality under Article 241 (ex Article 184) EC Treaty with respect to a Community measure when the time limit of Article 230(5) has expired and annulment of the general act could have been sought directly²⁰. It is interesting that the European Courts have not followed the rapid developments in the field of time limits in proceedings before national jurisdictions where the principle of effective judicial review was endorsed²¹.

The European Courts have also applied restrictive rules on standing for individual parties to nullify European Community measures²². For many years the Court of Justice made it very difficult for private applicants to establish direct and individual concern or to show that the contested act was in substance a decision where that was not how it was pronounced by the competent Community institution²³. Under established case law a measure in the form of a Regulation would not be accepted for judicial review under an action for annulment brought by an individual applicant. However, if the contested measure amounted to a Decision addressed to the applicant, the standing rules under Article 230(4) would be satisfied²⁴. Furthermore the Court of

¹⁸ A. Arnall, *Private applicants and the action for annulment since Cordoniu*, (2001) 38 CML Rev., p. 7

¹⁹ Joined Cases 193 and 194/87 *Henri Maurissen and European Public Service Union v. Court of Auditors* [1989] ECR I-1045, Joined Cases T-121/96 and T-151/96 *MAAS v. Commission* [1997] ECR II-1355, Case T-275/97 *Guerin Automobiles v. Commission* [1998] ECR II-253

²⁰ Case C-135/93 *Spain v. Commission* [1995] ECR I-1651; See a detail analysis of the relation of the plea of illegality with the action of annulment in D. Sinaniotis, *The Plea of Illegality in EC Law*, European Public Law (2001) Volume 7, Issue 1, p. 103

²¹ Case C-208/90 *Emmott v. Minister for Social Welfare* [1991] ECR I-4269, Case C-246/96 *Magorrian and Cunningham v. Eatern Health and Social Services Board and the Department of Health and Social Services* [1997] ECR I-7153, Case C-188/95 *Fantask A/S v. Industriministeriet (Erhvervs-Sministeriet)* [1997] ECR 6783, Case C-48/96P *Windpark Groothusen GmbH and Co. Betriebs KG v. Commission* [1998] ECR I-2873

²² A. Arnall, *Challenging Community Acts-An Introduction*, in *Public Interest Litigation before European Courts*, edited by H-W. Micklitz and N. Reich, Nomos Verlagsgesellschaft, 1996, p. 43

²³ C. Harding, *The Private Interest In Challenging Community Action*, (1980) 5 EL Rev., p. 357; A. Arnall, *Private Applicants and the Action for Annulment since Cordoniu*, (2001) 38 CML Rev., p. 7

²⁴ Case 16/17/62 *Confederation Nationale des producteurs de fruits et legumes v. Council* [1962] ECR 471, Case 25/62 *Plaumann v. Commission* [1963] ECR 95, Joined Cases 19-22/62 *Federation nationale de la boucherie en gros et du commerce en gros des viandes v. Council* [1962] ECR 391,

Justice has consistently taken a strict line with the requirement of individual concern²⁵, but there have been some situations in which it had been more willing to allow proceedings under Article 230 EC Treaty to be brought by private applicants²⁶. A more liberal approach to the question of standing rules for individual applicants was finally adopted in the *Cordoniu* Case²⁷, where it was implied that a private applicant who wishes to challenge a regulation only needs to establish individual and direct concern and that it was no longer necessary to deal separately with the requirement of a decision²⁸. It was obvious that the Court of Justice showed willingness to relax the test of individual concern. Both the declining need to show that a regulation is in fact a decision and the relaxation of the requirement of individual concern had a serious impact to the evolution of more generous rules on standing in the context of general legislative measures²⁹. Moreover, the Court of First Instance maintained the obstacles when private applicants have sought declarations that regulations were void. In a number of cases the CFI employed a conservative interpretation of Article 230(4) EC Treaty, despite the developments in *Cordoniu*³⁰. Even more difficulties arise for individuals when challenging the legality of Directives. The European Courts have repeatedly held that a directive was manifestly

Case 101/76 *Koninklijke Scholten Honig v. Council and Commission* [1977] ECR 797, Case 113/77 *NTN Toyo Bearing Co v. Council* [1979] ECR 1185, Joined Cases 103 to 109/78 *Societes des Usines de Beauport v. Council* [1979] ECR 17, Joined Cases 789 and 790/79 *Calpak v. Commission* [1980] ECR 1949, Case 45/81 *Moksel v. Commission* [1982] ECR 1129; See M. Nettesheim, *Article 173 of the EC Treaty and Regulations: Towards the Development of Uniform Standing Requirements*, in *Public Interest Litigation before European Courts*, edited by H-W. Micklitz and N. Reich, Nomos Verlagsgesellschaft, p. 225-240

²⁵ Case 26/86 *Deutz und Geldermann v. Council* [1987] ECR 941, Case 97/85 *Deutsche Lebensmittelwerke v. Commission* [1987] ECR 2265

²⁶ A. Arnall, *Private Applicants and the Action for Annulment under Article 173 of the EC Treaty*, (1995) 32 CML Rev., p. 30; Case 26/76 *Metro v. Commission* [1977] ECR 1875, Joined Cases 239 and 275/82 *Allied Corporation v. Commission* [1984] ECR 1005, Case 191/82 *Fediol v. Commission* [1983] ECR 2913, Case 11/82 *Piraiiki-Patraiki v. Commission* [1985] ECR 207, Case 264/82 *Timex v. Council and Commission* [1985] ECR 849, Case 169/84 *Cofaz v. Commission* [1986] ECR 391, Case C-358/89 *Extramet Industrie SA v. Council* [1991] ECR I-2501, Case C-152/88 *Sofrimport v. Commission* [1990] ECR I-2477

²⁷ Case C-309/89 *Cordoniu v. Commission* [1994] ECR I-1853

²⁸ A. Arnall, *supra* n° 26., p. 39

²⁹ A. Ward, *Judicial Review and the Rights of Private Parties in EC Law*, Oxford University Press, 2000, p. 225

³⁰ Case T-476/93 *FRSEA v. FNSEA* [1993] ECR II-1187, Case T-489/93 *Unifruit Hellas EPE v. Commission* [1994] ECR II-1201, Case T-183/94 *Cantina cooperativa fra produttori vitivinicoli di Torre di Mosto v. Commission* [1995] ECR II-1941, Case T-482/93 *Weber v. Commission* [1996] ECR II-609, Case T-472/93 *Campo Ebro Industrial SA v. Council* [1995] II-421, Case T-107/94 *Christina Kik v. Council* [1995] ECR II-1717, Case T-298/94 *Roquette Freres v. Council* [1996] ECR II-1531, Case T-100/94 *Michailidis and Others v. Commission* [1998] ECR II-3115, Case C-93/97 *P France v. Comafrika and Others* [1999] ECR I-185

not of individual concern³¹ and despite the indications that emerged from *Cordoniu* and *Extramet*, there has been no relaxation of the standing requirements for judicial review of Directives under Article 230 (4) EC Treaty³². Apart from the unwillingness of the European Courts to be more generous to private applicants, in a number of cases the requirement of direct concern also emerged as a strong obstacle³³. Further, the European Courts have created an additional standing requirement for individuals according to which applicants need to show an interest in the proceedings alongside direct and individual concern. This additional requirement states that a measure can be challenged only if it affects the interests of the applicant by bringing a distinct change in his/her legal position³⁴.

This restrictive approach on standing rules is subsequently apparent in the indirect applications for interim relief. In its early case law the Court of Justice held that in applications for a request of the suspension of a measure with general effect, such as regulations, the applicant must prove in a particularly clear fashion that he is concerned directly and individually³⁵. The same approach has been applied in applications concerning Directives, where the Court of Justice ruled that the contested measure was of general application and produced legal effects with regard to categories of persons envisaged in a general and abstract manner, and therefore could not be considered as a decision which concerned him directly and individually³⁶. In October 2000 the President of the Court of Justice felt it right to dismiss the appeal against the order of the Court of Instance, which ruled an application for interim relief inadmissible³⁷. The ECJ referred once more to the established strict condition of individual concern (Case 25/62 *Plauman v. Commission* [1963] ECR 95, Case C-309/89 *Cordoniu v. Council* [1994] ECR I-1853) and showed no intention of

³¹ Case 138/88 *Joseph Flourez v. Council* [1998] ECR 6393, Case 160/88 *FEDESA v. Council* [1988] ECR 6399

³² Case C-289/89 *Government of Gibraltar v. Council* [1993] ECR I-3605, Case T-99/94 *Asocarne v. Council* [1994] ECR II-871, See Case T-135/96 *UEAPME v. Council* [1998] ECR II-2335 where it was held that the fact that a contested measure was in the form of a Directive was not enough to reject the action as inadmissible and that it was essential to examine the measure was of direct and individual concern to the applicant.

³³ Case T-96/92 *CCE de la Societe Generale des Grandes Sources and Others v. Commission* [1995] ECR II-1213, Case T-12/93 *CCE de Vittel and Others v. Commission* [1995] ECR II-1247, Case T-485/93 *Dreyfus v. Commission* [1998] ECR II-1101, Joined Cases T-172/98 and T-175/98 to T-177/98 *Salamander and Others v. Parliament and Council* [2000] ECR II-2487

³⁴ Joined Cases T-125/97 and T-127/97 *Coca-Cola Company v. Commission* [2000] ECR II-3269

³⁵ Case 44/75 *R Firma Karl Konecke v. Commission* [1975] ECR 637

³⁶ Case 160/88 *Federation Europeenne de la Sante Animale and Others v. Council* [1988] ECR 6399

³⁷ Case C-300/00 *P-R Federacion de Cfradias de Pescadores de Guipuzcoa and others v. Council and Commission* [2000] ECR I-8797

“changing the system of remedies and procedures established by Articles 230 EC, 234 EC and 235 EC”³⁸. In the particular case the Court of Justice was mainly concerned with the admissibility of the application for interim relief and subsequently of the action of annulment. Thus it did not examine the substantive part of the application relating to the urgency, which necessitated the adoption of interim measures in order to avoid any irreparable and serious damage to the applicant. The structure of the judicial system of interim relief, as applied in the cases of the European Court of Justice, illustrates the difficulties that judges and therefore individuals have to deal with in order to guarantee interim protection of Community rights. A strong argument for this position is that the majority of applications for interim relief before the European Court of Justice have been dismissed. In some cases the application for the suspension of a Community Regulation was dismissed as inadmissible without the Court being able to examine the other conditions for interim relief³⁹. In other cases the European Court of Justice avoided considering the issue of admissibility, and rejected the application for interim relief based on a remaining substantial condition⁴⁰. The test for granting interim relief has proved to be difficult to satisfy, the result being the refusal to provisionally suspend a Community measure or adopt any other interim measures in order to avoid any detrimental effect on the interests of individuals⁴¹.

The approach that the Court of First Instance adopted cannot be considered uniform. It therefore cannot guarantee the effective protection of individuals. It has mainly followed the same policy as the ECJ and in a number of cases it has ruled that the contested regulation in the particular case could not be considered a provision which concerned the applicant individually and therefore give him standing for its annulment under Article 230(4) EC Treaty⁴². In contrast, in an antidumping case the Court referred to *Extramet* and ruled that the applicant was individually concerned by

³⁸ *Ibid*, para. 37

³⁹ Case C-257/93 *R Leon Van Parijs and Others v. Council and Commission* [1993] ECR I-3918, Case C-64/93R *Donatab Srl and Others v. Commission* [1993] ECR I-3956, Case C-107/93R *AEFMA v. Commission* [1993] ECR I-4178, Case C-300/00 P-R *Federacion de Cofradias de Pescadores de Guipuzcoa and Others v. Council and Commission* [2000] ECR I-8797

⁴⁰ Case C-51/90R and C-59/90R *Cosmos-Tank BV, Matex Nederland BV and Mobil Oil BV v. Commission* [1990] ECR 2168, Case C-106/90R *Emerald Meats Ltd v. Commission* [1990] ECR 3377, Case C-358/90R *Compagnia italiana alcool Sas di Mario Mariano and Co v. Commission* [1990] ECR 4888, Case C-213/91R *Abertal SAT Ltd and Others v. Commission* [1991] ECR I-5110, Case C-6/94R *Descom Scales Manufacturing Co. Ltd v. Council* [1994] ECR I-869, Case C-43/98P (R) *Camar Srl v. Commission* [1998] ECR I-1818

⁴¹ A. Ward, *supra* n° 29, p. 255.

⁴² Case T-6/95 *Cantine Dei Colli* [1995] ECR II-647; See also Case T-13/99 R *Pfizer Animal Health SA/NV v. Council* [1999] ECR II-1961, Case T-70/99 R *Alpharma Inc. v. Council*, [2002] ECR II-3495

the contested regulation on account of certain factors constituting a peculiar situation which distinguished it, as regards that regulation, from any other trader⁴³. Moreover the Court of First Instance has applied the strict test for individual concern in another case where it was apparent that the adoption of interim measures was urgent in order to avoid irreparable damage to the applicants linked to the alleged nuclear test in Tahiti⁴⁴. It was ruled that the circumstances of the case would not be sufficient to distinguish the applicants individually in the same way as a person to whom the contested decision is addressed as it was required by the conditions for an action for annulment⁴⁵. Finally, in a number of applications concerning the suspension of a Community Regulation, the Court of First Instance dismissed the applications on the grounds that one of the conditions for interim relief was not satisfied and consequently there was no need to examine the issue of admissibility of the main action⁴⁶.

It has been shown that the requirement of 'direct and individual concern' has created barriers to the award of interim relief to individuals. An assessment of the interpretation of the European Courts' rulings on such requirement either directly, in an action of annulment, or indirectly, in an application for interim relief, illustrates that there has been an substantial barrier to the development of Article 230(4) EC and the effectiveness of sanctions that attach to the action of annulment, i.e. the availability to award of interim relief under Articles 242 and 243 EC Treaty. Irrespective of whether or not there have been cases showing willingness to relax the strict requirements for individuals to challenge the validity of Community measures⁴⁷ and subsequently apply for the suspension of such measures till the final judgment of the validity is given, the effective protection of their rights has not been guaranteed. The European Courts have ensured that the traditional restrictions on locus standi are maintained. It is true that now private parties can challenge the validity of all

⁴³ Case T-2/95 R *Industrie des poudres spheriques v. Council* [1995] ECR II-487

⁴⁴ Case T-219/95 R *Marie-Therese Danielson and Others v. Commission* [1995] ECR II-3051

⁴⁵ *Ibid.*, para. 71

⁴⁶ Cases T-278/93R and T-555/93R, T-280/93R and T-541/93R *David Alwyn Jones and Mary Bridget Jones and Others v. Council and Commission* [1994] ECR II-13, Case T-228/95 *S. Lehrfreund Ltd v. Council and Commission* [1996] ECR II-113, Case T-41/97R *Antillean Rice Mills NV v. Council* [1997] ECR II-449, Case T-6/97R *Comafrika SpA and Dole Fresh Fruit Europe Ltd and Co v. Commission* [1997] ECR II-294

⁴⁷ See also C. Delicostopoulos, *L'encadrement processuel des autorités de marché en droit français et communautaire*, L.G.D.J., 2002, p. 288-304, where the standing requirements of Article 230(4) EC are analysed from the point of view of cases dealing with issues of competition law. Delicostopoulos argues that in competition cases there has been a kind of "enlargement" of the access of individuals to judicial review (see p. 304).

measures without having to show that the contested measure is in form a decision. However, the European Courts seem to have imposed stricter requirements for the test of individual concern, particularly when the measure is of a general legislative nature⁴⁸. If individual applicants wish to apply for the suspension of a Regulation or Directive, that are of a general legislative nature, it will still be difficult for them to satisfy the requirement of being individually concerned. Even if the European Courts usually avoid examining the issue of admissibility and finally reject the application of interim relief as unfounded based on the lack of urgency or of serious and irreparable damage, the system of interim relief does not become more effective. In a situation where all conditions are finally met, private applicants cannot feel confident that they will pass the threshold of admissibility, where the issue of direct and individual concern will still arise in its restrictive form.

Surprisingly the Court of First Instance in *Jeso-Quere and Cie SA*⁴⁹ tried to create new standards for the standing requirements of individuals. Although the European Courts have been criticized for inconsistency on the issue of challenges from individual applicants via the proceedings of Article 230 (4) EC Treaty, the Court of First Instance attempted to deal with the issue in favour of individuals' interests. The case concerned several provisions of the Commission Regulation 1162/2001, where private applicants sought the annulment via Article 230 EC Treaty. The Court of First Instance considered the Regulation as a general measure and went on to examine whether the private applicants could be directly and individually concerned by it. First it made reference to the long-established case law⁵⁰ of the Court of Justice and ruled that according to the criteria of the previous judgments of the European Courts on the notion of individual concern under Article 230(4) EC Treaty, *Jego-*

⁴⁸ See K. Lenaerts, *The Legal Protection of Private Parties under the EC Treaty: a coherent and complete system of judicial review?*, in *Scritti in onore di Giuseppe Federico Mancini*, Vol II, 1998, p. 519; F. Jacobs, *Access to justice as a fundamental right in European Law*, in *Melanges en homage a Fernand Schockweiler*, 1999, p. 197; G. Vandersanden, *Pour un elargissement du droit des particuliers d'agir en annulation contre des actes autres que les decisions qui leur sont adressees*, (1995) C.D.E., p. 535;

⁴⁹ Case T-177/01 *Jeso-Quere and Cie SA v. Commission*, [2002] ECR II-2365

⁵⁰ Case C-358/89 *Extramet Industrie v. Council* [1991] ECR I-2501, Case C-309/89 *Codorniu v. Council* [1994] ECR I-1853, Case C-451/98 *Antillean Rice Mills v. Council* [2001] ECR I-8949, Case C-386/96 *Dreyfus v. Commission* [1998] ECR I-2309, Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-255/99 *Comafrika and Dole Fresh Fruit Europe v. Commission* [2000] ECR II-1975, Case 25/62 *Plaumann v. Commission* [1963] ECR 95, Case C-213/91 *Abertal SAT v. Commission* [1993] ECR I-3177, Case 11/82 *Piraiki-Patraiki v. Commission* [1985] ECR 207, Case C-152/88 *Sofrimport v. Commission* [1990] ECR I-2477, Joined Cases T-480 and 483/93 *Antillean Rice Mills v. Commission* [1995] ECR II-2305, Case C-390/95 *Antillean Rice Mills v. Commission* [1999] ECR I-769

Quere could not be considered as individually concerned by the contested Regulation⁵¹.

The Court of First Instance was not satisfied with the previous approach adopted by the European Courts on the issue of individual concern and attempted to take a more liberal approach. A potential judgment, which would reject the action for annulment of *Jego-Quere* as inadmissible, would not seem restrictive following the approach adopted all these years by the European Courts. However the Court of First Instance considered it essential to examine the argument of the private applicant in relation to the effective remedy available for the protection of his Community rights. In particular, the Court of First Instance considered it convenient to examine whether in a case where the legality of a general measure which directly affected the judicial position of the applicant, the inadmissibility of an action for annulment could deprive the private applicant from any effective remedy⁵². An individual can challenge the validity of Community measures before the European Courts via the procedure of Article 230(4) EC Treaty, or indirectly by challenging it before national courts, who can request the Court of Justice to make a preliminary ruling under Article 234 EC Treaty. He may even protect his rights through the action under Articles 235 and 288 EC Treaty on non contractual liability of the European Community. The Court of First Instance ruled that preliminary proceedings could not form an adequate judicial protection for individuals, as a requirement to access the national courts was for the private applicants to break any national measure implementing the general Community measure⁵³. In addition an action for damages based on the non-contractual liability of the Community cannot be a satisfactory solution for the protection of individuals' interests. While private applicants are not obliged to satisfy the strict standing requirements appearing in Article 230(4) EC Treaty in order to bring an action for damages, the nature of the judgment in such proceedings cannot be effective enough for the protection of their rights⁵⁴. An action for damages under Article 288(2) EC Treaty does not seek to annul a Community measure, as the only order available is an award of compensation and any finding as to the lawfulness of

⁵¹ See Case T-177/01 *Jeso-Quere and Cie SA v. Commission* [2002] ECR II-2365, par. 38

⁵² *Ibid*, para. 43

⁵³ *Ibid*, para. 45; for a detailed analysis of the inadequacy of Article 234 EC Treaty as a remedy for individuals see previous section

⁵⁴ A. Ward, *supra* n° 29, p. 289

the contested act is entirely incidental⁵⁵. In *Jego-Quere* the Court of First Instance stressed the inadequacy of an action for damages as an effective remedy by stating that the judicial control of the contested general measure is not extended to all the elements possible to affect the legality of the measure, but to the confirmation of the possible violations which justify the compensation of the private applicant⁵⁶. Therefore, the only possible solution emerging for the Court of First Instance was the relaxation of the test of individual concern under Article 230(4) EC Treaty. It held that there was no argument which could support the approach that a private applicant, affected by a general Community measure, was under the obligation to show that he/she is individually concerned, in an analogous way as the addressee of the measure⁵⁷. Finally, in order to guarantee effective judicial protection for individual applicants, a natural or legal person can be considered individually concerned by a general Community measure which affects him directly, if the contested measure restricts his rights, or imposes obligations on him⁵⁸.

Despite the opening up of the standing requirements in *Jego-Quere and Cie Sa Case*⁵⁹ and the opinion of Advocate General Jacobs in *Union de Pequeños Agricultores v. Council*⁶⁰, where he argued that the new notion of individual concern seems to be the only way to avoid what may in some cases be a total lack of judicial protection⁶¹, there is little indication that the standing obstacles in an application for interim relief will be removed through the evolution in case law. In July 2002 the European Court of Justice did not follow Advocate General Jacobs's opinion proposing that "an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests"⁶². Instead it ruled that, although the direct and individual concern condition must be interpreted in the light of the principle of effective judicial protection, such interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by

⁵⁵ Case C-63/89 *Assurances du credit and Compagnie belge d'assurance credit SA v. Council and Commission* [1991] ECR I-1799

⁵⁶ See *Jego-Quere*, *supra* n° 50, para. 46

⁵⁷ *Ibid*, para. 49

⁵⁸ *Ibid*, para. 51

⁵⁹ Case T-177/01 *Jego-Quere and Cie SA v. Commission* [2002] ECR II-2365

⁶⁰ Case C-50/00 P *Union de Pequeños Agricultores v. Council*, [2002] ECR I-6677, opinion delivered on 21 March 2002

⁶¹ *Ibid*, para. 62

⁶² *Ibid*, para. 102

the Treaty on the Community Courts⁶³. With this judgment the European Court of Justice missed the chance to provide individuals full and effective protection against general Community measures⁶⁴. In relation to interim relief, this ruling re-established that, according to the system for judicial review of legality established by the EC Treaty, a natural or legal person can apply for interim relief challenging a regulation only if it is concerned both directly and individually.

Following the judgment in *Jeso-Quere*, the Court of First Instance had the chance to apply the new formula of standing rules in applications for interim relief brought before it. In its order on 12 July 2002 the Court of First Instance ruled that the application for the suspension of the Commission Regulation 560/2002 was admissible as long as at this stage of interim relief proceedings there was no obstacle opposed to the admissibility of the main action for annulment of the contested regulation⁶⁵. It is remarkable that the Court of First Instance did not refer to the new formula that it had adopted just two month previously but, instead, based its conclusion on the consistent case-law⁶⁶ allowing it, if necessary, to establish that the main action reveals *prima facie* grounds for concluding that there is a certain probability that it is admissible. Such approach cannot be considered as providing the necessary safeguards for an effective protection of the individual in the interim relief proceedings. The Court of First Instance once more avoided making a clear statement as to whether the strict *locus standi* requirement would apply in its traditional form or whether the *Jego-Quere* formula was the new authority in relation to the admissibility of the application for interim relief. This confusion was illustrated later on in *VVG Internationale Handelsgesellschaft*⁶⁷, where the Court finally dismissed the application for suspension of a Commission Regulation as inadmissible, as long as the private applicants were not individually concerned by the contested regulation. The Court did not follow the statement in *Jego-Quere* according to which the number and

⁶³ Case C-50/00 P *Union de Pequenos Agricultores v. Council*, [2002] ECR I-6677, para. 44; See P. Gilliaux, *Larrêt Unión de Pequeños Agricultores: Entre subsidiarité juridictionnelle et effectivité*, (2003) C.D.E., p. 177-202

⁶⁴ F. Ragolle, *Access to justice for private applicants in the Community legal order: recent (r)evolutions*, (2003) 28 EL Rev., p. 101

⁶⁵ Case T-163/02R *Montan Gesellschaft Voss mbH Stahlhandel, Jespen Stahl GmbH, LNS, Metal Traders Stahlhandel GmbH v. Commission*, [2002] ECR II-3219, para. 22

⁶⁶ Case T-6/95R *Cantine dei colli Berici v. Commission* [1995] ECR II-647, Case T-219/95R *Danielsson v. Commission* [1995] ECR II-3051, Case T-13/99R *Pfizer Animal Health v. Council* [1999] ECR II-1961

⁶⁷ Case T-155/02R *VVG International Handelsgesellschaft mbH, VVG (International) Ltd, Matalsivas Metallwarenhandelsgesellschaft mbH v. Commission*, [2003] ECR II-1949

the situation of other natural and legal entities affected by the contested Community measure would be irrelevant in the 'individual concern' test. In contrast, the main argument for the Court in rejecting the application was that, even if the contested Regulation affected the economic situation of the applicants, this circumstance would not suffice to characterise them as individually concerned in relation to other individuals. Surprisingly enough the Court followed the traditional criteria of the individual concern test, and did not try to apply the relaxed formula that it had previously introduced in *Jego-Quere*. Once more the Court of First Instance did not give the chance to individual applicants to effectively protect their Community rights. The lack of effectiveness is apparent from the fact that the Court did not have the chance to deal with the substantive conditions of urgency and serious damage, which could justify the award of interim relief. The objection of inadmissibility of the main action was once more the long-standing barrier to the private applicants to receive an order based on the substantive part of their application for interim relief. And, what is more, when dealing with the admissibility of the main action and, subsequently the admissibility of the application for interim relief, the Court still does not guarantee a uniform and consistent approach. It is early to conclude that the *Jego-Quere* formula will be a new principle established by the European Courts, but it is already apparent that the Court is not ready to abandon the 'classic' case law on individual concern that it has developed throughout the years.

Rejecting the applications for interim relief as inadmissible cannot be considered an effective pattern in the system of judicial protection. This point takes us back to the notion of 'manifestly inadmissible', which was analysed in Chapter II. There has been a long-established case law that when the main action is manifestly inadmissible, the judge hearing the application of interim relief can provisionally rule the action inadmissible and therefore dismiss the application for interim relief too. However the direct and individual concern test cannot be easily identified in the summary proceeding of interim relief and therefore the question, which still remains to be answered, is what is the most effective solution for the European Courts to adopt. Although the judicial system established by the Treaty is not mature enough to embrace the *actio popularis*⁶⁸, it is evident that it is essential to introduce a new

⁶⁸ J. Cooke, *Locus Standi of private parties under Article 173 (4)*, Irish Journal of European Law 1997, p. 4

concept of standing rules for the effective protection of individuals⁶⁹. As AG Jacobs stresses, the European Community now affects the interests of the individuals directly, frequently and deeply; there is therefore a correspondingly greater need for effective judicial protection against unlawful action⁷⁰. It has been argued that an individual should be individually concerned if *prima facie* any of his rights under Community law has been infringed the effective protection of which must be undertaken by the Court of Justice⁷¹. The ultimate goal would be a future amendment of the relevant Treaty provision in order to vest individual applicants with standing rules to challenge any breach made by a Community institution which affects their Community rights or a principle of Community law⁷². However one of the disappointing outcomes of the Amsterdam IGC was the absence of any improvement of access to the Court of First Instance for individual applicants challenging the validity of Community legislation⁷³.

A more relaxed test will help the Court, to surmount the issue of admissibility and proceed to the examination of the arguments on urgency and serious damage. In that way the complexities related to the notion of 'manifestly inadmissible' applications will not relate any more to the standing rules. A codified rule on individual concern will allow private applicants to apply for interim relief, feeling confident that the Court will not reject the application as inadmissible based on a case by case approach. Instead of relating the effectiveness of interim relief to the admissibility of the application, the individuals will have the chance to receive an order based on the real purpose of their application, i.e. the provisional protection of their Community rights. The ancillary nature of interim relief proceedings should not result in too much focus on the admissibility of the main action, but on the pure *raison d'être* of interim relief: to urgently protect the putative Community rights of individuals.

⁶⁹ A. Arnall, *Private Applicants and the Action for Annulment under Article 173 of the EC Treaty*, (1995) 32 CML Rev., p. 7; BIICL, *The Role and Future of the European Court of Justice*, BIICL, 1996, p. 94; See Opinion of AG Slynn in Case 246/81 *Bethell* [1982] ECR 2277; Opinion of AG Jacobs in Case C-358/89 *Extramet Industrie* [1991] ECR I-2501; Opinion of AG Colomer in Case C-142/95 P *Associazione agricoltori della provincia di Rovigo and others* [1996] ECR I-6669

⁷⁰ See Opinion of AG Jacobs in *UPA*, *supra* n° 59, para. 77

⁷¹ Neuwahl, *Article 173 Paragraph 4 EC Past, Present, and Possible Future*, (1996) 21 EL Rev., p. 17

⁷² A. Ward, *Judicial Review and the Rights of Private Parties in EC Law*, Oxford University Press, 2000, p. 343; P. Birkinshaw, *A Constitution for the European Union? - A Letter from Home*, E.P.L., March 2004, Volume 10, Issue 1, p. 82

⁷³ A. Ward, *Amsterdam and Amendment to Article 230: an opportunity lost or simply deferred?*, in *The Future of the Judicial System of the European Union*, edited by A. Dashwood and A. Johnston, p. 37

V.3.B) *Interim relief before the national courts*

When deciding whether to grant interim relief, either by suspending a national measure which is based on an allegedly invalid Community measure, or by awarding any other interim measure when an individual is challenging the validity of a national administrative act implementing a Community measure, the European Courts require national judges to apply the conditions provided for by the Treaty when an application for interim relief is sought under Articles 242 and 243 EC⁷⁴. The European Court of Justice thought that this approach would create a satisfactory result in every case of interim relief, since it considered it possible to establish an analogy between the interim relief remedies and procedures governing actions before the European Courts and those available before the national jurisdictions. In particular the aim of this approach was to create of a uniform system of interim relief in order to safeguard the uniform application and protection of Community rights throughout the Community. Based on this assumption the European Court of Justice ruled that interim relief which protects individual Community rights before national jurisdictions must remain the same, irrespective of whether individuals contest the compatibility of national legal provisions with Community law or the validity of secondary Community law, in view of the fact that the dispute in both cases is based on Community law itself⁷⁵. Accordingly, attention needs to be paid on the effectiveness of interim legal protection of individual Community rights before national courts.

A fundamental distinction needs to be made to fully comprehend the consequences of such statement and the subsequent effectiveness of the uniform 'Community' conditions provided by the Court of Justice. The issue of interim protection of Community rights before national courts can arise in two different situations. Firstly, individuals can challenge the validity of a national administrative measure implementing a Community measure and therefore seek the adoption of interim relief until the Court of Justice has ruled on the validity of the Community measure through the preliminary ruling procedure under Article 234 EC Treaty. This was the issue in *Zuckerfabrik* and *Atlanta*. Secondly, individuals can challenge the

⁷⁴ Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen Ag v. Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn* [1991] ECR I-415, Case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH v. Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761

⁷⁵ See *Zuckerfabrik*, *supra* n° 73, para. 20

compatibility of a national measure with Community law and still apply for the adoption of interim relief until final judgment is given by the European Court of Justice on the interpretation of the relevant Community measure. This was the issue in *Factortame*⁷⁶. Bearing this distinction in mind it will be shown that the interim protection of individuals cannot be effective when the conditions which need to be satisfied in both situations are identical, despite what the European Court of Justice hoped when it gave its judgments.

In *Factortame* the Court did not answer the question concerning the criteria that should be applied in the case where the compatibility of a national measure with Community law is challenged. Of course, any national rules applicable to cases of that nature need to meet the minimum requirements that the Court of Justice has provided requiring all national procedural rules not to be less favourable than those for the enforcement of national law rights nor to be applied in such a way as to make the exercise of an individual Community right excessively difficult⁷⁷. It was finally in *Zuckerfabrik* that the Court of Justice ruled that the conditions applicable in a challenge of the validity of a national measure implementing a Community measure should apply in a compatibility case too. Furthermore, Advocate General Mischo in *Francovich* argued that national courts should be bound by the same conditions, irrespective of whether an individual is seeking the suspension of the operation of a national administrative measure or the suspension of the operation of a national measure which is alleged to be incompatible with Community law⁷⁸.

There appears to be no substantive justification for this conclusion as the two situations are wholly different⁷⁹. A simplistic⁸⁰ approach that calls for uniformity of the conditions of interim relief before national courts ignores the particularity of each application for interim relief and therefore it strongly affects the effectiveness of interim protection and the position of individuals, when seeking the provisional protection of their Community rights.

Firstly it is the nature of the challenged national administrative measure in proceedings of interim relief, which immediately places the individual in a different

⁷⁶ Case C-213/89 *R v. Secretary of State for Transport, ex parte Factortame Ltd* [1990] ECR I-2433

⁷⁷ Case 45/76 *Comet v. Produktschap voor Siergewassen* [1976] ECR 2043, Case 33/76 *Rewe v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989

⁷⁸ Joined Cases C-6 and 9/90 *Francovich and Bonifaci v. Italy* [1991] ECR I-5357

⁷⁹ P. Oliver, *Interim Measures: Some Recent Developments*, (1992) 29 CML Rev., p. 17

⁸⁰ L. Papadimas, *Interim Protection under Community Law before the National Courts. The Right to a judge with Jurisdiction to Grant Interim Relief*, L.I.E.I., p. 190

position in relation to the protection of his Community rights. When a private applicant applies for the suspension of a national measure implementing a Community measure, the focus is correctly placed on the judicial system established by Community law. A national measure implementing a Community act forms part of the Community legislative process and not of the national one⁸¹. When the individual is challenging the validity of this measure and requests interim relief, he actually challenges the Community measure, which is the exclusive legal source for the national act's adoption. This exclusive relationship between the two measures justifies the particularity of the system of interim relief, being analogous to the one applied before the European Courts under Articles 242 and 243 EC Treaty. In such a case the individual enters the field of Community law and is required to fulfil all conditions that the latter provides in actions before the European Courts. The reason of this particularity is that the legal issue raised is involved purely with Community law, as the contested national measure is the product of a Community measure, which demands administrative intervention from national authorities⁸².

In contrast, when an individual challenges the compatibility of a national measure with Community law and requests the award of interim relief, the legal framework appears to be more close to the national legal order than the one established by Community law. Simply applying the analogous conditions under Articles 242 and 243 EC Treaty means that the effective interim relief of individuals' rights might be jeopardised. This can be seen in a situation where the application for interim relief of a private applicant is rejected, based on the fact that the national court has been precluded from suspending a national measure because such relief would be unavailable before the European Courts in similar circumstances⁸³. Having said that, the Community interest for uniform application of Community law outweighs the effective protection of individual Community rights before national jurisdictions.

The approach adopted by the Court of Justice cannot be considered as having only negative consequences for the uniform application of Community law and the preservation of legal certainty. The uniform conditions of interim relief, irrespective of the particularity of the case before the national courts have been a fundamental

⁸¹ R. Kovar, *le droit national d'exécution du droit communautaire. Essai d'une théorie de l'écran communautaire*, in *Mélanges Boulois*, Dalloz 1991, p. 341

⁸² L. Papadias, *supra* n° 79, p. 184

⁸³ P. Oliver, *supra* n° 78, p. 17

achievement of the Court which guarantees effective judicial protection⁸⁴. However, taking into consideration these conditions, it is appropriate to analyse their effectiveness in a case where the compatibility of a national measure with Community law is challenged and the private applicant requests the adoption of interim measures for the provisional protection of his/her Community rights.

The first issue which needs to be examined is the obligation of the national court in interim relief proceedings to refer a question to the European Court of Justice under the Article 234 EC procedure⁸⁵. It has to be accepted that the purpose of such obligation derives from the nature of the particular issue that the Court of Justice had to deal with in *Zuckerfabrik*. The new competence of national courts to rule on the validity of a Community measure, even in an indirect way, by suspending the national measure implementing a Community act, had to be exercised under limitations, in order to guarantee the exclusive competence of the Court of Justice to rule on the validity of a Community measure. As pronounced in *Foto-Frost*⁸⁶, where a national court, not subject to the third paragraph of article 234 EC, understands that a Community measure is invalid, it may not make such a finding itself, but must seek a preliminary ruling thereon from the Court of Justice⁸⁷. The requirement of uniform application of EC Law urged the Court of Justice to avoid any possible disparity from national courts if any Community measures could be declared void in several Member States. And the exclusive competence of the Court of Justice to declare a Community measure invalid seemed an essential means to guarantee the coherence of the judicial system⁸⁸. In such a situation, the power of the national court is limited to examining whether the applicant's case raises any serious doubts as to the legality of the contested measure to justify a reference for a preliminary ruling from the Court of Justice under Article 234 EC Treaty. Applying such obligation to interim relief proceedings the Court of Justice reaffirmed its exclusive competence on validity issues. Such conditions can appear to be in conformity with the preliminary procedure

⁸⁴ See Chapter III

⁸⁵ See *Zuckerfabrik*, *supra* n° 73, para. 24

⁸⁶ Case 314/85 *Foto-Frost*, [1987] ECR 4231, par. 17

⁸⁷ See Arnulf, *National Courts and the Validity of Community Acts*, (1988) E.L.Rev., p. 125, G. Bebr, *The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty (cases 314/85 and 133 to 136/85)*, (1988) 25 CML Rev., p. 667; Goffin, *De l'incompétence des juridictions nationales pour constater l'invalidité des actes d'institutions communautaires*, (1990) C.D.E., p. 216

⁸⁸ See *Foto-Frost*, *supra* n° 85, para. 14-15; Case C-334/95 *Kruger GmbH and Co KG v. Hauptzollamt Hamurg-Jonas* [1997] ECR I-4517

under Article 234 EC Treaty and the case law on this matter. Nevertheless there are some questions which remain with no substantive answers. It cannot be concluded that the Court of Justice requires the national judge to refer a preliminary ruling, as this would be in contradiction with the summary and rapid proceedings of interim protection. Furthermore, the obligation of the national judge dealing with the main action to refer a validity issue to the Court of Justice under Article 234 EC Treaty does not have any consequence or relevance with the duties of the national court before which interim relief is requested. Anyway there would be no point in the national judge waiting for the response of the Court of Justice on the preliminary question before ordering (or not) any interim protection to the individual applicant. Therefore opinions differ as to the interpretation of the judgment of the Court of Justice in *Zuckerfabrik*. Firstly, the wording in *Zuckerfabrik* could be read as if imposing the obligation to refer a question only to the national court dealing with the main action and not to the national court dealing with the ancillary application for interim relief. Such proposal would be in harmony with Article 234 EC Treaty, which is framed in terms of a national court requesting a ruling from the Court of Justice where it considers that a decision on the question is necessary to enable it to give judgment⁸⁹. As long as the national judge in interim relief proceedings is not dealing with the substance of the main action⁹⁰, it seems meaningless to link these proceedings with a preliminary question, which is necessary only for the judgment in the main proceedings. In interim relief proceedings, the national court remains able to refer a question to the Court of Justice, but such power should not be presented as an obligation, as was done in *Zuckerfabrik* and *Atlanta*. If the national court refers the preliminary question when it is dealing with the interim relief application, the situation is not ambiguous. However, if the same court does not refer the question, it should be accepted that such question can be, and finally should be, referred by the national court dealing with the main action even at a later stage.

Secondly, the creation of an obligation to refer imposed on the national court and in particular in interim relief proceedings does not follow the existing system provided for under Article 234 EC Treaty, when the national court is dealing with compatibility issues. There is no justification in the existing legal provisions for any

⁸⁹ P. Craig, *The Jurisdiction of the Community Courts Reconsidered*, in *The European Court of Justice*, G. De Búrca and J.H.H. Weiler, p. 202

⁹⁰ See Chapter I

kind of obligation that the national court might have, when deciding to refer a question of interpretation of Community law. There is a lacuna in the jurisprudence of the Court of Justice as to any explanation for such an obligation. It would be wrong to view the Court of Justice as imposing any additional obligation on national courts to refer a question of interpretation of Community law in interim relief proceedings- in order to guarantee the uniform application of Community law, when such obligation does not exist in proceedings of a main action.

Finally, following the two previous points on the relationship between a preliminary ruling and interim relief proceedings, it still remains difficult to find any legal effect that such ruling can have for the summary proceedings of interim protection. When the question is referred to the Court of Justice the national court has already decided whether or not to order any interim relief, even before the preliminary ruling is sent back to the latter. The only possible legal effect that can be deduced from such a preliminary reference, would be the possibility of the individual applicant or any third party with interest in the case to ask for the recalling of the order of interim relief based on a legal opinion, which had finally been overruled following the preliminary ruling of the European Court of Justice. However, amendments of national administrative procedure, as well as of the preliminary procedure⁹¹, would need to be adopted in order for such a proposal to have any effect for the private applicants seeking interim protection of their community rights⁹². In Greece, for example, the Code of Administrative Procedure provides specific reasons under which the applicant can ask for the recalling of the order of the national court dealing with interim relief proceedings. As long as there is no appellate system related to interim relief proceedings, an applicant cannot claim, based on the preliminary ruling of the ECJ, that the national court has interpreted Community law or has applied Community law in the wrong way⁹³.

Furthermore there is another point in the system of interim relief that the Court of Justice introduced in *Zuckerfabrik* and *Atlanta*, which creates ambiguities as to how the cases on validity issues, as well as cases on compatibility issues can be dealt with under the same conditions. In particular, the Court of Justice stressed that the national court needs to show serious doubts as to the validity of a Community act and

⁹¹ P. Craig, *supra* n° 88, p. 177

⁹² Article 205 para. 6 of the Code of Administrative Procedure

⁹³ D. Raikos, *Interim Measures in the Code of Administrative Procedure* (in Greek), in (2003) 34 *Dike International*, p. 791

refer the question of validity to the Court of Justice if such issue has not already been brought before it⁹⁴. Therefore, apart from the issue concerning the obligation to refer a question to the Court of Justice, analysed above, it still remains unclear whether the condition regarding the “serious doubts” of the national court can be applied to cases relating to the compatibility of a national administrative measure with Community law and, if so, how the national court will fulfil such a condition. Firstly, the wording of both judgments provides that the condition is expressed in such a way, so as to deal with the specific issue of the validity of Community law, as long as the Court of Justice has granted a new power to the national court to indirectly rule on the validity of a Community act. If it is assumed that the same requirement applies to cases such as *Factortame*, the wording of the judgment could be paraphrased as follows: “that the court entertains serious doubts as to the compatibility of the national administrative act and, if the compatibility of the contested measure is not already in issue before the Court of Justice, it itself refers the question to the Court of Justice”. If one follows the reasoning that an obligation to make a preliminary reference to the Court of Justice on the interpretation of Community law lacks any legal explanation according to the existing system of preliminary rulings, it cannot be justified why the national court will have to show serious doubts of the compatibility of a national measure when referring to the Court of Justice. Furthermore, when the Court of Justice issued a non-binding “Guidance on References by National Courts for Preliminary Rulings”⁹⁵ it provided that the national court should include a statement of reasons for which it considers a Community act invalid. Surprisingly, the “Guidance” refers only to cases related to the validity of Community law and does not remind national courts of the *Factortame* cases, where interim relief proceedings are related to the compatibility of national measures to Community acts⁹⁶. Theoretically this condition could be minimised as long as the national court includes the order of interim relief in the reference showing all the arguments behind the decision to take the particular order. However, it is uncertain how the condition will be fulfilled when the reference is made by the national court dealing with the main action. As is stated in *Atlanta*, this requirement is orientated towards the grant of interim relief as long as the national court is not obliged to refer a question, if the validity issue is already an

⁹⁴ See *Zuckerfabrik*, *supra* n° 73, para. 33; See *Atlanta*, *supra* n° 73, para. 36

⁹⁵ *Guidance on References by National Courts for Preliminary Rulings*, [1997] 1 CMLR 78

⁹⁶ C. Barnard and E. Sharpston, *The Changing Face of Article 177 References*, (1997) 34 CML Rev., p. 1151

issue before the Court of Justice or the latter has previously ruled on the matter⁹⁷. Therefore the question is whether the Court of Justice requires the national court in interim relief proceedings to have serious doubts as to the compatibility of a national measure in order to grant interim relief, or instead whether it is a requirement for the relevant reference. It would be of no surprise if these questions arose before the Court of Justice in the future. Although there has been an implied similarity between the two different cases of interim relief, there is no clear indication that the Court of Justice would not deal with these questions, if properly drafted and brought before it through the preliminary proceedings of Article 234 EC Treaty.

Finally, due to the substantive test that national courts are bound to apply in both cases of interim relief, principally when considering the validity of Community measures and the compatibility of national law with Community law, the inevitable consequence will be that individuals will not have the same chance of obtaining an interim order in both disputes⁹⁸. The source of the “unequal” treatment of individuals lies in the condition of Community interest, which needs to be taken into account by the national courts when deciding whether to grant interim relief or not⁹⁹. In validity cases, where the private applicant is seeking the suspension of the application and enforcement of the contested Community measure, the Community interest would probably weigh against the award of any provisional suspension of a Community measure. This is because such interim order would not ensure the uniform application of EC law. When individuals challenge the compatibility of national measures with Community law, the Community interest would be considered in favour of any interim order disapplying a national measure which might jeopardise the continuous enforcement and the uniform application of Community law pending the final judgment on the compatibility of the national measure. Therefore, the Community interest illustrates the notion that although the Court intended to unify the conditions for all interim relief cases, individuals will not be treated in the same way as expected and will have a better chance of receiving an interim order protecting their putative rights in the context of unlawful conduct by Member States, as opposed to Community Institutions. It would hence seem right to change the interim relief

⁹⁷ See *Zuckerfabrik*, *supra* n° 73, para. 24, *Atlanta*, *supra* n° 73, para. 32

⁹⁸ A. Ward, *Judicial Review and the Rights of Private Parties in EC Law*, Oxford University Press 2000, p. 34

⁹⁹ See *Zuckerfabrik*, *supra* n° 73, para. 30 and 31; See *Atlanta*, *supra* n° 73, para. 44

conditions imposed to national courts, in order to achieve a similarity or even equality of treatment that individuals seek.

V.4) An incomplete system of interim relief

In *Factortame*, *Zuckerfabrik* and *Atlanta* the Court of Justice granted the power of national courts to grant interim relief, as well as the conditions under which such power has to be exercised, without however incorporating any further general criteria in order to harmonise the Community system of interim protection of individual rights. Therefore, under Article 234 EC Treaty the Court of Justice attempted to give a ruling confined to the specific disputes in question and avoided dealing with more theoretical issues concerning interim relief. The result was that the Community law standards for the granting of interim relief forced the national courts into an arena where it was not fully equipped to deal with conflicts from a Community law perspective¹⁰⁰. It will be shown below that the effect of these three judgments was to create an unequal treatment not only between individuals of different Member States but also between individuals of the same Member State.

The first consequence, which emerged from the establishment of uniform conditions for the granting of interim relief, was the issue of reverse discrimination in the procedural plane¹⁰¹. The new system of interim relief did not incorporate any safeguards for the equal treatment of individuals with regard to claims based on Community law and claims based on national law. In Germany it was argued that the new Community law standards made any possible suspension of an administrative measure much more difficult to get than previously, when only national procedural rules had been applicable¹⁰². This became further apparent in cases before English Courts. Here the Courts were granted the power to protect provisionally individuals' rights deriving from Community law, namely to suspend the application of an Act of Parliament, without however being able to exercise such power when the claim of private parties was based on national law. In the latter situation the common law rule

¹⁰⁰ J. Schwarze, *The Role of the European Court of Justice in Shaping Legal Standards for Administrative Action in the Member States. A Comparative Perspective*, in *Judicial Review in European Union Law*, edited by D. O'Keefe and A. Bavasso, Kluwer Law International 2000, p. 460

¹⁰¹ T. Tridimas, *The General Principles of EC Law*, Oxford University Press, 1999, p. 304

¹⁰² W. Dänzer-Vanotti, *Der Gerichtshof der Europäischen Gemeinschaften beschränkt vorläufigen Rechtsschutz*, *Der Betriebs-Berater*, 1991, p. 1015; R. Voss, *The national perception of the Court of First Instance and the European Court of Justice*, (1993) 30 CML Rev., p. 1130

prohibiting any injunction against a Minister of the Crown would still apply. Such diversity in the system of interim relief cannot be considered effective for the protection of individual rights or coherent within, and between, the national and Community legal orders. The notion of equal judicial protection of private parties before the law is not respected. The impact of this differential treatment was mitigated by the House of Lords in *M v. Home Office*, where it was declared that temporary measures could be issued against a Minister in proceedings that had no Community law relevance whatsoever¹⁰³. A similar problem was also apparent in France, where national administrative courts could not issue any provisional measures¹⁰⁴. However it was until Article L 22 of the Code des Tribunaux administratifs introduced the possibility of issuing provisional measures in matters with Community relevance, that interim protection of individuals improved in France¹⁰⁵. In Greece too, the system of interim relief before administrative courts was not complete and it did not provide an effective provisional protection to individuals' rights. It was in 1999 that the Code of administrative procedure introduced a complete system of interim relief, where finally individuals could request that they be granted interim measures other than the traditional suspension of national administrative acts¹⁰⁶.

Although these three examples illustrate the voluntary reception, either directly, or indirectly, of Community standards in their own national legal systems, it remains clear that national legal systems in the field of interim relief are far from identical and there are still discrepancies. In particular, with regard to claims based on rights deriving from Community law, the criteria introduced by the Court of Justice in *Factortame*, *Zuckerfabrik* and *Atlanta*, cannot guarantee that individuals will be treated equally in cases with identical and similar issues of interim protection throughout the various Member States. This is due to the fact the national procedural rules still apply in interim relief proceedings related to claims based on Community law. A national court will have to refer to its own procedural rules in order to identify whether it has competence to deal with particular cases. Furthermore, national

¹⁰³ *M v. Home Office* [1993] 3 All ER 537 (HL); See M. Fordham, *Judicial Review Handbook*, 2nd edition, John Wiley and Sons, 1997, p. 255; A. Barav, *Omnipotent Courts*, in *Institutional Dynamics of European Integration, Essays in honour of H.G. Schermers*, edited by D. Curtin and T. Heukels, 1994, p. 301

¹⁰⁴ *Conseil D'Etat*, Decision of 15 February 1978, *Plantureux*, AJDA 1978, p. 501

¹⁰⁵ J.F. Flauss, "French Report", in *Administrative law under European influence: on the convergence of the administrative laws of the EU member states*, edited by J. Schwarze, London, 1996, p. 83

¹⁰⁶ P. Lazaratos, *The temporary judicial protection according to the Code of Administrative Procedure* (in Greek), Sakkoulas, 2002, p. 53

procedural law will set the criteria for active and passive legitimation of private applicants, who may be the plaintiff and the defendant in interim relief proceedings, the time limits for an application of interim relief and the rules of evidence. The only limitations to the application of national procedural rules are the principles that the Court of Justice introduced in *Comet* and *Rewe* requiring all national procedural rules not to be less favourable than those for the enforcement of national law rights, nor to be applied in such a way as to make the exercise of an individual Community right excessively difficult¹⁰⁷. However, these principles provide the minimum requirements in relation to claims brought before national courts of the same Member State. The question whether citizens of a Member State can receive the same interim protection as citizens of another Member State receives a laconic answer. The Court of Justice attempted to answer the question by creating Community law standards. However, they do not finally set aside all national procedural rules applicable to interim relief proceedings before national courts. A simple example can be seen through comparative research of the right to make an appeal against an order granting interim relief. Although in French law there is a right of appeal against orders granting interim relief concerning the protection of fundamental rights, in Greece the Code of Administrative Procedure does not provide such right to the applicants, apart from the right to recall the order if there are new facts¹⁰⁸. The Court of Justice has still not ruled on this issue and it remains to be seen how it would deal with such a question, especially taking into consideration that the Rules of Procedure allow appeals to the Court of Justice against any judgment of the Court of First Instance concerning interim measures¹⁰⁹.

It is therefore clear that the system of interim relief provided by the Court of Justice for the national courts is not complete. Of course, the beginnings of a uniform system of Community Law standards have been beneficial for the effective protection of individuals. But questions remain that the Court will have to answer in the near future. Although there is a positive feeling that national courts will refer questions related to conditions for the granting of interim relief, it is still difficult to predict whether the Court of Justice will follow the same approach as it previously had by

¹⁰⁷ Case 45/76 *Comet v. Produktschap voor Siergewassen* [1976] ECR 2043, Case 33/76 *Rewe v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989

¹⁰⁸ Article 205 para. 6 of the Code of Administrative Procedure; See also P. Lazaratos, *supra* n° 105, p. 71.

¹⁰⁹ Statute of the Court of Justice, article 50; ECJ Rules of Procedure, Articles 111, 112

making an analogy with the rules applicable to interim relief proceedings before it (articles 242 and 243 EC Treaty), or whether it will try to find solutions deriving from the procedural systems of the various Member States¹¹⁰.

V.5) The creation of a “double standards” system

The Court of Justice tried to create an analogy with the interim relief proceedings before it in order to bestow the power, and the criteria for that power, to national courts to grant interim relief for the protection of Community rights. This approach can be justified by the need of the Court of Justice to secure the uniform application of Community law throughout the Member States. At that moment in time when the preliminary question appeared before it, an analogy with the existing system of interim relief under Articles 242 and 243 EC Treaty seemed to everyone to be the optimal solution. The requirement of homogeneity of procedural rules in both national and Community levels urged the Court of Justice to build a wide system of European administrative law by applying the conditions that already were provided for in applications of interim relief before the European Courts. The question that remains to be answered is whether the “analogy” approach adopted in *Zuckerfabrik* and *Atlanta* is the ideal solution for the creation of the system of interim protection of the individual before national courts.

The Court of Justice obviously ruled that the national courts have the power to grant interim relief in cases concerning Community rights, but there is no explanation in the judgments why such approach is the most effective one¹¹¹. The fact that the system of interim relief in the various Member States is different and such diversity could jeopardise the uniform application of Community law, urged the Court of Justice to play a predominant role in the evolution of Community law standards. However in the judgments there is no reference to the differences of the various national procedural systems and there are no explanations as to why the application of national procedural rules could jeopardise the uniform application of Community law. Furthermore, in *Factortame*, *Zuckerfabrik* and *Atlanta* the Court of Justice does not

¹¹⁰ J-D. Combrexelle, *L'impact de l'arrêt de la Cour: étendue et limites des pouvoirs du juge national*, in *Evolution récente du droit judiciaire communautaire*, Volume 1, edited by Vassilis Christianos, European Institute of Public Administrator, Maastricht, 1994, p. 122

¹¹¹ W. Danzer-Vanotti, *Der Gerichtshof der Europäischen Gemeinschaften beschränkt vorläufigen Rechtsschutz*, Der Betriebs-Berater, p. 1016

give the reasons for considering the interim relief provisions under article 242 and 243 EC Treaty as being the most appropriate ones to cover the lack of any Community legislation on interim relief issues. The only argument put forward was that the power of national courts to suspend the enforcement of a Community measure is parallel with the power of the Court of Justice provided under Article 242 EC Treaty, according to which actions brought before it do not have any suspensory effect, unless it finds it necessary to order the suspension of the contested measure¹¹². It is remarkable how the Court of Justice does not include in its judgments any comparative analysis between the various national systems of interim relief, through which it could have created new Community principles based on the diverse national legal orders¹¹³.

Furthermore it was the similarities between the purpose of an action of annulment and that of a preliminary ruling that urged the Court of Justice to make an analogy between the interim relief proceedings before the European Courts and those before national jurisdictions¹¹⁴. Even if individual applicants will succeed in receiving a ruling protecting their Community rights, either directly through an action under the EC Treaty provisions or, indirectly, through a national court, when a preliminary reference has been sent to the Court of Justice, this parallel system cannot guarantee the same level of effectiveness for the protection of Community rights. It is questionable whether access to the Court of Justice through the proceedings of Article 234 EC Treaty can be considered an effective remedy for individual applicants. The individual, who suffers detriment, must 'succeed' in obtaining a reference to the Court of Justice¹¹⁵. Under Article 234(2) EC Treaty national courts dispose of a discretionary power to decide whether or not to refer a question for a preliminary ruling on Community law issues they are called to rule on¹¹⁶. It is solely for the national courts before whom actions are brought, to determine, in the light of the special features of each case, the need for a preliminary ruling in order to enable them

¹¹² See *Zuckerfabrik*, *supra* n° 73, para. 27, See *Atlanta*, *supra* n° 73, para. 39

¹¹³ W. Danzer-Vanotti, *supra* n° 110, p. 1016

¹¹⁴ See *Zuckerfabrik*, *supra* n° 73, para. 18, See *Atlanta*, *supra* n° 73, para. 22

¹¹⁵ A. Ward, *supra* n° 97, p. 266

¹¹⁶ Although Article 234 (3) EC Treaty obliges national courts of first instance to refer a question for a preliminary ruling, such obligation cannot guarantee effective protection of individuals as the time for appeals within the national judicial system can cause long delay jeopardising the principle of effective protection and the legal certainty of the legal system.

to deliver judgment¹¹⁷. National courts may well feel that, even though an individual party to the case before them has argued that there was a question of Community law, which had to be considered, this claim was misconceived¹¹⁸. Furthermore, it is for the national courts themselves to determine the questions which are going to be referred to the Court of Justice and there remains the possibility for errors in the preliminary assessment of validity. The Court of Justice has rejected a number of references when it ruled that the questions formulated by the national courts were entirely irrelevant to the case pending before it or even when the questions were of a hypothetical nature, or when there was no information contained in the files¹¹⁹. For many national judges a reference to the Court of Justice remains an exceptional event, as it is not always easy for those unfamiliar with Community law to identify and formulate relevant questions and to set out the background to a case clearly and concisely¹²⁰. Finally, the discretion of the national judge to refer to the Court of Justice and to formulate the question might end up by redefining the claims of the individual parties. National courts are not obliged to include all Community measures that applicants challenge, nor each and every ground of invalidity that they have sought to rely on. It is therefore clear that the possibility to encourage a reference for a preliminary ruling does not guarantee full effective judicial protection against Community measures, which individuals challenge before national courts. Individual applicants have no right to decide whether a reference should be made, or which Community measures should be referred for judicial review, or what grounds of invalidity have been brought before the Court of Justice. Following the wording of the Court of Justice¹²¹ that under Article 234 EC Treaty it is concerned with the imperative requirements concerning uniform application of Community law and legal certainty, it is clear that the protection of individual rights are of secondary importance. There is no judicial

¹¹⁷ Case 166/73 *Rheinmühlen v. Einfuhr und Vorratsstelle Getriebe* [1974] ECR 33, para. 4-5, Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, para. 17

¹¹⁸ P. Craig and G. De Búrca, *EU Law: Text, Cases and Materials*, Oxford University Press, 1998, p. 420 Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health* [1982] ECR 3415;

¹¹⁹ Case 126/80 *Salonia v. Poidomani* [1981] ECR 1563, Case C-286/88 *Falciola* [1990] ECR I-191, Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, Case 104/79 *Foglia v. Novello* [1980] ECR 745, Case C-83/91 *Meilicke v. ADV/ORG* [1992] ECR I-4871, Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo v. Circostel* [1993] ECR I-393

¹²⁰ A. Arnall, *The European Union and its Court of Justice*, Oxford University Press, 1999, p. 59

¹²¹ Case 66/80 *International Chemical Corporation v. Amministrazione delle Finanze dello Stato* [1981] ECR 1191

remedy under Community law for individuals if the national court refuses to refer the case for a preliminary ruling before the Court of Justice¹²².

In addition, the fact that individuals could challenge the validity of Community measures before national courts and ask for the suspension of the contested measure without any strict standing requirements and without any time limit as in action of annulment under Article 230 EC Treaty has urged the Court of Justice to reconsider the conditions for a reference for a preliminary ruling¹²³. In a significant judgment, the Court of Justice ruled that an applicant could not challenge the validity of a Community measure before national courts when the standing requirement to bring an action of annulment was indisputable and when the applicant allowed the time limit in Article 230 EC Treaty to expire without bringing an action before the Court of Justice¹²⁴. This approach justifies the argument that the national courts are not effectively protecting the individuals' rights when the latter challenge the validity of a Community measure. National courts are expected to verify the locus standi of an individual to challenge a Community measure before the European Court. It is doubtful how effective that process can be when already national courts are precluded from declaring a Community measure invalid and when such examination is a complex issue even for the European Courts¹²⁵. It is not always going to be possible for national courts to distinguish clearly between cases where the admissibility of proceedings under Article 230 EC Treaty is self-evident, and cases where it is less apparent¹²⁶. The application of this ruling can create a considerable amount of ambiguity for individuals. This is because they will have to prove before national courts that they did not have locus standi under Article 230 EC Treaty. Also the individual will not be fully free to decide not to bring a direct action considering that it does not have locus standi, only to find out that he/she is precluded from challenging the validity of the Community measure before national courts, because

¹²² N. Reich, *Public Interest Litigation before European Jurisdictions*, in *Public Interest Litigation before European Courts*, edited by Hans-W. Micklitz and Norbert Reich, p. 3

¹²³ Cases 133 to 136/85 *Rau v. Balm* [1987] ECR 2289; See for a detailed analysis of the ECJ's approach on the relevant issue: D. Wyatt QC, *The Relationship between actions for annulment and Reference on Validity after TWD Deggendorf*, in *Remedies for Breach of EC Law*, edited by J. Lunday and A. Biondi, John Wiley and Sons, 1997, ch. 6, p. 55

¹²⁴ Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, Case C-178/95 *Wiljo v. Belgian State* [1997] ECR I-585, Case C-408/95 *Eurotunnel and Others v. SeaFrance* [1997] ECR I-6315

¹²⁵ G. Tesaro, *The Effectiveness of Judicial Protection and Co-operation between the Court of Justice and the National Courts*, (1993) 13 YEL, p. 1

¹²⁶ A. Arnulf, *Private applicants and the Action for Annulment under Article 173 of the EC Treaty*, (1995) 32 CML Rev., p. 7, 44

the Court of Justice in its preliminary ruling finally decide that the standing requirements under Article 230 EC Treaty had been met¹²⁷. Such consequences cannot favour the application of the principle of effective protection of individuals' rights before national courts.

Therefore, in order to fully assess the need to create a uniform system of interim relief through the Community, the Community judiciary interpreted its existing provisions as being the ideal measures to be analogously transposed in the national procedural systems. As a result of this case law, disparities occurred at the level of the Community and the level of Member States that is between similar cases where Community rights are at stake¹²⁸. Although the Court of Justice referred to the similarities between the actions brought before it, and the actions brought before national courts, where individuals request the protection of their Community rights, it is apparent that it has finally created a system of interim relief with double standards. Firstly, through a simple comparative reading of the Treaty provisions¹²⁹ for interim relief and the relevant judgments¹³⁰ providing the same power to national courts to grant interim protection, differences are immediately apparent. In particular, the Court of Justice did not literally repeat the conditions set out in the Treaty, but instead it imposed stricter requirements, which individuals will have to fulfil¹³¹. Indeed, although in *Factortame* Advocate General Tesouro illustrated the similarities amongst the conditions of interim relief in the various Community legal systems, identifying the two basic criteria as the *fumus boni juris* and the *periculum in mora*¹³², the Court of Justice also added the obligation to refer the question of validity for a preliminary ruling. The justification for this was apparently related to the Court's exclusive competence to declare a Community measure invalid. Secondly, the disparities between the two systems are also apparent in the sense that national courts remain the 'masters' of Community Law jurisdiction conferred upon them to grant interim relief¹³³. In *Zuckerfabrik* the Court of Justice ruled that the suspension of the

¹²⁷ T. Tridimas, *supra* n° 100, p. 168

¹²⁸ W. Van Gerven, *Comparative law in a texture of Communitarization of National laws and Europeanization of Community Law*, in *Judicial Review in European Union Law*, edited by D. O'Keefe and A. Bavasso, Kluwer Law International 2000, p. 437

¹²⁹ Articles 242 and 243 EC Treaty

¹³⁰ See *Zuckerfabrik* and *Atlanta*, *supra* n° 73

¹³¹ See the previous section where there is an analysis on the condition of Community interest

¹³² See Advocate General Tesouro's Opinion in Case C-213/89 *Regina v. Secretary of State for Transport, ex parte Factortame Ltd and Others*, [1990] ECR I-2433, para. 33

¹³³ S. Apter, *Interim Measures in EC Law: Towards a Complete and Autonomous System of Provisional Judicial Protection before National Courts?*, EJCL Vol 7.2 June 2003

enforcement of the contested Community measure is governed by *national procedure law*, in particular as regards the making and examination of the application for interim relief¹³⁴. Although national courts have to assess the minimum standards and criteria laid down by the Court of Justice, they still possess their autonomy as regards time limits, locus standi and evidence and appeals. The existence and use of different procedural rules for the protection of Community rights does not guarantee a completely uniform system of provisional protection. Even though the differences might not be dramatic, in a theoretical (procedural) point of view individuals are faced with different conditions in cases where the same Community rights are at risk. Furthermore, the Court of Justice has failed to unify the provisional protection of individuals as national courts still reserve a power of discretion. It is entirely up to the national judge to decide whether the conditions of interim relief have been fulfilled and once they have granted interim measures, it remains impossible for the Court of Justice to change this decision. Indeed the Court of Justice failed to guarantee to the individual applicants that a closer co-operation can be achieved between itself and the national courts in cases where the granting of interim relief was wrongfully ordered¹³⁵.

Therefore the Court of Justice did create a system of interim relief before national courts but at the same time it reinforced the phenomenon of double standards in the field of remedies, which are intended to enable Community citizens to enforce rights which derive from Community law before European and national courts¹³⁶. Thus, in the field of interim relief the Court of Justice allows two different regimes to provisionally protect individuals' rights which derive from Community law. One regime before the European Courts under articles 242 and 243 EC Treaty, and another before national courts according to the guidelines that the Court of Justice provided in *Factortame*, *Zuckerfabrik* and *Atlanta*. In addition this differential treatment is apparent in applications from interim relief brought before national courts as a result of breaches of Community Institutions or of Member States. At the same time, the Court of Justice's case law has the effect of altering any rules and relevant remedies on interim relief within each Member State but only in so far as Community rights are at stake, and not for breaches of purely national law by the

¹³⁴ See *Zuckerfabrik*, *supra* n° 73, para. 26

¹³⁵ P. Oliver, *Interim Measures: Some recent Developments*, (1992) 29 CML Rev., p. 9

¹³⁶ W. Van Gerven, *supra* n° 127, p. 437; R. Caranta, *Judicial protection against Member States: a new jus commune takes shape*, (1995) 32 CML Rev., p. 724

same national authorities. The consequences of this diversity is the co-existence of two different interim relief systems for the protection of Community rights provided to individuals not only at the Community law level but also within each national legal system. It is essential to remedy the resulting disruption and reach a solution where homogeneity of rules, at both national and European levels, can be guaranteed. Such homogeneity will correct the anomaly whereby individuals are governed by different systems even though they find themselves in similar situations, and might have to rely on different rules of interim relief before the courts when they wish to seek provisional protection of their Community rights.

CONCLUSION

This thesis examined the protection of individuals' Community rights in proceedings of interim relief before the European and national courts. A number of conclusions may be drawn from this extended analysis. A traditional understanding of the provisions of the EC Treaty and the relevant cases of the Court of Justice evidence the existence of the right of individuals to request interim relief for the protection of their putative Community rights either in proceedings before the European courts or their national jurisdictions. The European legal order, in its sui generis nature, has managed to provide under articles 242 and 243 EC Treaty the procedural right to individuals to request the suspension of a Community measure or the grant of any other necessary interim measures in order to safeguard their substantive EC rights until final judgment is given in the main action¹. Furthermore the Court of Justice bestowed on the national courts the power to grant interim relief when individuals are indirectly challenging the invalidity of a Community measure or the compatibility of a national administrative measure with Community law². At this stage of the European integration process at the level of judicial protection, the right of individuals to a provisional protection of EC rights forms part of the *acquis communautaire*, part of the Community law built up over the years.

However the imperative of interim relief proceedings for the protection of Community rights does not, as it has been shown, necessarily equate with the "effective" judicial protection of individuals' rights. Even if the Court of Justice tried to place the individual in a predominant position when Community rights are at stake, the result has been the creation of a system that tends to portray the imperative of uniformity of all Community measures as more important than the effective protection of individuals.

In proceedings before the European Courts the individual is still placed in an disadvantageous position when challenging a Community measure and subsequently requests the grant of interim relief under Articles 242 and 243 EC Treaty. The ancillary nature of interim relief proceedings urges individuals to comply with the

¹ See an extended analysis in Chapter I and II

² Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433, Case C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn* [1991] ECR I-415, Case C-465/93, *Atlanta Fruchthandelsgesellschaft and others v. Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761

strict conditions provided for direct actions, and in particular under Article 230(4) EC Treaty. The restrictive rules on standing have obstructed attempts by private applicants to successfully challenge a Community measure and request the suspension of such measure for the provision protection of their Community rights. Irrespective of whether there have been some cases³ showing willingness to relax the strict standing requirements, the European Court of Justice has ensured that the traditional restrictions remain firmly in place⁴. As a result, the majority of applications for interim relief have been dismissed as inadmissible leaving the individuals without the possibility to receive an order based on the real *raison d'être* of the application, i.e. to urgently protect their putative Community rights. The excessive focus on the admissibility of the main action and the need to cross the threshold of *locus standi* has had detrimental repercussions for interim relief proceedings for individuals. The drafting of appropriate provisions which provide individuals with the right to standing if there is a breach of their Community rights is fundamental if judicial protection is to be improved⁵. Such amendment initiated from the legislative institutions would eliminate number of the difficulties that individuals face when bringing direct actions and applications for interim relief and would allow the European Courts to examine in detail the substantive issues when determining whether Community rights provided to individuals have been breached.

In addition to these difficulties, the situation does not seem improved in the appeals that individuals can bring before the ECJ against the orders of the CFI on applications for interim relief. For the moment the number of appeals is remarkably low, and the number of appeals accepted by the ECJ even lower. It is interesting to mention that the possibility of an appeal seems to serve well the principle of effective protection, if compared with several national jurisdictions where such appeals are not provided under national procedural rules. However the appellate jurisdiction of the ECJ remains an interesting issue as regards applications for interim relief. Whether an individual appellant will be effectively protected by the appellate Court of Justice will

³ Case C-358/89, *Extramet Industrie SA v. Council* [1991] ECR I-2501, Case C-309/89, *Cordoniu SA v. Council* [1994] ECR I-1853, Case T-135/96 *UEAPME v. Council* [1998] ECXR II-421, Case T-177/01, *Jego-Quere and Cie SA v. Commission* [2002] ECR II-2365; See also opinion of AG Jacobs in Case C-50/00P, *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677, delivered on March 2002

⁴ Case C-50/00, *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677

⁵ A. Ward, *Judicial Review and the Rights of Private Parties in EC Law*, Oxford University Press, 2000, p. 343

depend on whether the requirements which need to be satisfied for an order granting interim relief are points of law or not. It seems that the ECJ has not yet established a general rule on that, but prefers to deal with the circumstances and issues for the particular case before it.

The Draft Treaty establishing a Constitution for Europe repeats the wording of Articles 242 and 243 EC Treaty which become Articles III-286 and III-287 and state that interim relief can be granted before the European Courts⁶. However, with respect to the action of annulment the Draft Treaty contains pragmatic improvements⁷, which could improve the position of individuals when challenging a Community measure and applying subsequently for interim relief. An amended version of Article 230 (4) EC Treaty, which becomes Article III-270, provides that individuals can also bring proceedings against a regulatory act which is of direct concern to him or her and does not entail implementing measures⁸. Although the strict conditions of direct and individual concern continue to apply for acts addressed to him/her, when an individual challenges a “regulatory act” the Draft Treaty abandons the requirement of individual concern and only requests that the contested act affects the applicant directly without any implementing measures needed. It could be concluded that the amended provision places the individuals in a better position, as they are able to challenge legislative acts of direct and individual concern, as it was pronounced in *Cordoniu*⁹, based now on a written provision of the Treaty and all other general acts which do not require implementing measures.

⁶ Article III-286 reads as follows: *Actions brought before the Court of Justice shall not suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended.* Article III-287 reads as follows: *The Court of Justice may in any cases before it prescribe any necessary interim measures.*

⁷ J. Schwarze, *Guest Editorial: The Convention's Draft Treaty establishing a Constitution for Europe*, (2003) 40 CML Rev., p. 1041; J.A. Usher, *Direct and individual concern- an effective remedy or a conventional solution?*, (2003) 28 EL Rev., p. 599; See also F.G. Jacobs, *Effective Judicial Protection of Individuals in the European Union, Now and in the Future*, in *The Treaty of Nice and Beyond*, edited by M. Andenas and J. Usher, Hart Publishing, 2003, p. 341-342

⁸ Article III-270(4) reads as follows: *Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.* The Secretariat of the Intergovernmental Conference stated that the term “regulatory act” should be replaced with “regulation or decision having no addressees”, which would make Article III-270(4) more coherent with Articles I-32 to I-36, which list the legal instruments in the European Union. See Document CIG 4/1/03, 6 October 2003, ‘Editorial and legal comments on the draft Treaty establishing a Constitution for Europe- Basic document’, <http://ue.eu.int/igcpdf/en/03/cg00/cg00004-re01.cn03.pdf>

⁹ Case 309/89 *Cordoniu SA v. Council* [1994] ECR I-1853

When examining the actual conditions for the grant of interim relief, it was made clear that individuals face an additional obstacle when it comes to deciding whether interim relief can be ordered. The tendency of the Court of Justice has been to employ the balance of interests approach before granting interim relief, even if such a condition is not expressly provided for in the relevant provisions. Unless this criterion becomes part of the explicit conditions for interim relief with any future amendment, it will still create inequality in the effective protection of individuals. It is not clear when the court will require the individual to show a higher level of harm and urgency in order to guarantee the grant of interim relief or, when the balance of interest will be the crucial test on which the decision is taken¹⁰. The effective interim protection of individuals urges the Court of Justice to use the balance of interest as the fundamental mechanism in order to take a decision on interim relief. But such approach should only be taken after such a condition has been incorporated in EC legislation. It should also be understood that the Community public interest is not superior to any individual interests. It must be accepted that the right of an effective protection of the individual is not in complete contradiction with the protection of Community interests, but instead they are principles that coexist and depend upon each other for the completion of the Community's objective- that of constructing a legal order committed to the ideals of uniformity and effectiveness of Community law.

In proceedings before the national courts individuals have been awarded the right to request the interim protection of their Community rights and it has been seen how the Court of Justice has placed the protection of the individual in the foreground¹¹. In the European Court of Justice's attempt to promote principles of uniformity and effectiveness of Community law throughout the Member States, in cases of interim relief, where Community procedural law took over in situations where national courts were asked to protect substantive Community rights¹². Although the result was the creation of new remedies in the field of interim relief and

¹⁰ Case 63/88R, *Maindiaux v. Economic and Social Committee* [1988] ECR 1693, Case 77/87R, *Technointorg v. Council* [1987] ECR 1793

¹¹ H.G. Schermers, note on Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Suderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, (1992) 29 CML Rev., p. 137

¹² Case C-208/90, *Emmott v. Minister for Social Welfare* [1991] ECR I-4269, Joined Cases C-6/90 and C-9/90, *Francovich and Others v. Italian State* [1991] ECR I-5257; Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen v. SPF* [1995] ECR I-4705; Case C-312/93, *Peterbroeck v. Belgian State* [1995] ECR I-4599

the chance for individuals to provisionally protect their Community rights, it does not seem that the desirable goal of effective judicial protection has been effectively achieved. This thesis has advanced the view that European Court of Justice has promoted the effective protection of individuals' Community rights. Indeed individuals have acquired the right for interim protection under Community law, even if national procedural law did not do so. Should this conclusion be accurate, the consequences of this right to interim relief would be more advantageous than they ultimately are in proceedings in the various Member States.

In the light of the judgments of the European Court of Justice, the power conferred on national courts to grant interim relief appears to apply in all cases where Community rights are at stake. In other words, the case law appears to have formed a unified system of requirements and conditions. In the context of the Community legal order one should differentiate two types of interim relief: (i) a *Factortame* situation concerning the suspension of enforcement of national provisions incompatible with Community law and (ii) a *Zuckerfabrik-Atlanta* situation dealing with the suspension of national measure implementing EC Regulations and the adoption of positive interim measures disapplying such Regulations. In view of the need to safeguard the uniformity of Community law, the European Court of Justice suggested that the conditions laid down in *Zuckerfabrik* and *Atlanta* would also be applicable in a *Factortame* type case. It is remarkable that the European Court of Justice considered it necessary to just mention that both situations were governed by Community law, without clarifying the fundamental differences that exist. For reasons that I believe will emerge in future cases before the European Courts, it was worth differentiating the cases where interim relief could be granted before national courts. When an individual is challenging the validity of a national measure implementing a Community measure, he/she actually enters the field of Community law. Because of this similarity to direct actions before the European Courts this justifies the particularity of the system of interim relief according to *Zuckerfabrik* and *Atlanta*, it being analogous to the one provided under Articles 242 and 243 EC Treaty. In contrast, in cases where an individual is contesting the compatibility of a national administrative measure with Community law, as in *Factortame*, the focus is still placed on a closer part with national law, where national courts would in principle grant interim measures according to domestic procedural standards and conditions and would comply with the principle of supremacy of Community law. It is true that

the House of Lords' decision in *Factortame* and the ECJ's ruling in *Zuckerfabrik* have a lot of similarities and the conditions pronounced by the ECJ in the latter are drawn from principles common to the laws of the Member States. These remarks could suffice to accept that the conditions for interim relief should be identical in both cases. However, the proposition that procedural requirements and conditions as provided for in *Zuckerfabrik/Atlanta* should apply in the latter situation does not appear convincing, since it finally creates a system where a national court could not suspend a national administrative measure, just because such relief would be precluded in similar cases before the European Courts. Finally the transposition in total of the conditions in *Zuckerfabrik* and *Atlanta* to a *Factortame* case would not seem a reasonable solution, as in the former rulings the ECJ's tried to impose strict criteria in order to avoid over-excited suspension of uniformly applicable Community rules, a need which does not seem to be imminent, or even apparent, in situations like *Factortame*, where the contested measure is a product of national legislation.

In addition to the absence of any clarification of the different cases before national courts where interim relief can be ordered, the European Court of Justice has created a system of interim relief with stricter requirements and conditions from the one applicable before the European Courts and in the various Member States. Although it seems that the conditions are analogous to Articles 242 and 243 EC Treaty and common among the Member States, the "obligation" to refer a preliminary question to the European Court of Justice, the "need" to show serious doubts, as well as the "effect" of the Community interest to the award of interim relief, illustrate the uncertainties that the proposed interim relief system brings to cases where individuals request provisional protection of Community rights. It can be argued that the system of interim relief before national courts includes stricter requirements, as the Court's aim was to ensure its competence to deal with the validity of Community measures, as well as to respect the functioning of the preliminary rulings under 234 EC Treaty. Accepting this point of view it seems justified that the conditions for granting interim relief were introduced in the first place in order to safeguard the effectiveness of preliminary rulings and not in order to provide individuals with an additional legal forum to provisionally protect their Community rights.

Moreover it is in the highly anticipated future judgments of the European Courts that all the remaining questions might be raised, and the Courts' approach criticized. In particular it is uncertain whether the ECJ will stick to its previous judgments

establishing a settle principle or whether it is going to overrule them. Could the judgment in *Krüger*, for instance, be considered as excluding for good any kind of submissions by the Commission to interim proceedings before the national courts when the latter assess the Community interest? Or will the EC Competition law enforcement regime, which gives such power to the Commission, influence the future ruling of the European Courts on interim proceedings of cases other than competition cases? Meanwhile, it is up to the national courts as well as to the lawyers to interpret the existing system in the most effective way for the protection of the individuals and the legal certainty of Community law.

It is interesting to see that in proceedings of interim relief before national courts the European Court of Justice did not really create a complete system of conditions and requirements. There is no simple answer to the question whether this system is entirely governed by European procedural rules or whether it has been left to the different procedural rules of the Member States. The ramifications following from the relevant judgments were the creation of a new power for national courts to grant interim relief for the protection of Community rights. From that point on, it is unclear which law has to be applied. The Court intervened in the area of interim protection by providing the national judicature with procedural conditions and requirements, but at the same time, it respected national procedural competence¹³. On the one hand it seems that the system provided by the Court created a set of detailed requirements that have to be met in order for the award of interim protection. From this perspective, Community law has intruded into the national procedural systems and imposed new rules, which will guarantee the protection of substantive Community rights. On the other hand, it can be argued that the Court provided a detailed set of conditions-principles which existing national procedural rules need to satisfy in order to grant interim protection of individuals. At first glance it might seem that the result of this debate does not really have any practical effect on interim relief proceedings so long as the majority of conditions imposed by the European Court are the same as the conditions in national procedural systems. But the impact is crucial if one considers that certain issues are still governed by domestic procedural rules. Whether an individual has the right to appeal against an order on interim relief before a national court, or whether the applicant has satisfied the standing requirements, are issues dealt

¹³ J.S. Delicostopoulos, *Towards European Procedural Primacy in National Legal Systems*, ELJ, Volume 9, Issue 5, p. 608

under national procedural law. It is fundamental for the effectiveness of the judicial protection of individuals to clarify whether the European procedural law will dictate all existing domestic rules, or whether the latter will continue, in principle, to apply in proceedings for the provisional protection of Community rights with the only limitation being that the minimum guiding requirements that the Court imposed are satisfied. It remains to be seen whether the Court will introduce, as it may well do, a more detailed Community system of interim relief, and substantially cover all issues of interim relief proceedings, or whether it will continue to adopt a piecemeal approach in order to cover the needs of each specific case.

It is generally agreed that the European Court of Justice's case law on interim relief and on national remedies and procedural rules has revealed a sense of uncertainty in the process of effectively protecting Community rights¹⁴. However, the Court's approach has harmonised, to a certain level, domestic rules of judicial protection. The study of interim relief proceedings proves that the Court of Justice has placed the interrelationship between substantive Community rights and procedural norms in prime position and acknowledged that in order to serve the principle of effective judicial protection it has had to intervene in areas that it had not previously dealt with, such as domestic procedural rules.

As a general remark, this intervention seems to be workable when the criteria set out by the ECJ are applied before the national courts in applications for interim relief. Cases before the English courts, such as *Imperial Tobacco* and *ABNA Limited*, showed the willingness of national courts to apply the Community law criteria set out by the ECJ. However this application proved to have several wrinkles, as it is not with absolute certainty that English courts are going to do so in all future cases as stated by the House of Lords. However this intervention in national procedural rules did not give all the answers to issues that could arise in proceedings before national courts. It still remains to be ruled whether a national administrative authority can suspend a EC measure until a preliminary ruling is given by the ECJ (*NVDN*, Case C-194/04) and whether the suspension of an EC measure ordered by a national court would apply in the other 24 Member States (*ABNA*, C-453/03).

¹⁴ A. Biondi, *The European Court Of Justice and Certain National procedural Limitations: Not Such a Tough Relationship*, (1999) 36 CML Rev., p. 1287; S. Prechal, *EC Requirement for an Effective Remedy*, in *Remedies for Breach of EC Law*, edited by J. Lonbay and A. Biondi, John Wiley and Sons, 1997, p. 12

All these remarks lead to the conclusion that the present system of interim relief as 'designed' by the ECJ is inconsistent, if not confusing. The ECJ should identify the dichotomy between the *Factortame* and the *Zuckerfabrik* situations. In that way national courts will be correctly subject to strict Community law requirements only when the case deals with the suspension of uniform Community measures. From this perspective, it can be argued that the very nature of the *Zuckerfabrik/Atlanta* type of case would justify a harmonised Community law system of interim relief, although a *Factortame* case could be governed by national procedural rules respecting the principles of effectiveness and non-discrimination.

This conclusion provides the basis for any further research, which will build upon the case law on interim relief and other procedural rules by analysing whether the European Court of Justice is the appropriate institution to guarantee the imperative of effective judicial protection before the European and national courts. In the making of the new European legal order, where Community rights can be effectively protected throughout all existing and potential Member States, it is crucial to identify the legal position of the European Court of Justice. The judge-made law on interim relief has certainly been revolutionary. But, as with all revolutionary action, it has led to criticism of the Court's decision-making methods and interpretations¹⁵. It is now clear that the principle of effective protection requires national courts to grant interim relief and to grant individuals standing to bring an action against a Community measure, even when they would be precluded under national procedural rules. However these obligations are imposed on the national authorities without any explicit provision in the EC Treaty and the European Courts are still refrained from going beyond their expressed competences. Furthermore the attempts for a wider interpretation of Article 230(4) EC Treaty and the improvement of the judicial protection of individuals in the European legal order, as pronounced by Advocate General Jacobs in *UPA*, did not affect the Court of Justice's approach towards the individual. Although there are recent cases, like *Munoz*, which illustrate the ECJ's intention to improve the judicial protection of individuals against Community measures, and to define the subjective rights of individuals as a new way to protect the quality of these rights and provide all proper remedies, it seems that an emerging

¹⁵ U. Everling, *On the Judge-Made Law of the European Community's Courts*, in *Judicial review in European Union Law*, edited by D. O'Keeffe and A. Bavasso, Kluwer Law International, 2000, p. 29; T. Tridimas, *The Court of Justice and Judicial Activism*, (1996) 21 EL Rev., p. 199

written group of Community rules in the field of judicial protection before national courts would be a positive step.

Furthermore, the rational reaction to the Court's judgments can be an interesting issue for future research, if considered in relation to the legislative intervention on the part of the Community in the field of public procurement. In this area, national remedies, including interim relief proceedings were considered to be fundamental¹⁶ for upholding the procurement regime so as to justify the harmonisation of national procedural rules by EC Directives¹⁷. Although Community legislation was unprecedented in the area of domestic procedural rules, the need for uniformity of Community procurement rules shows that the Community intervention in the domestic systems of judicial protection is based on a sectoral approach¹⁸. Thus, in some areas, it can be seen that Community institutions insist on the creation of substantive and procedural uniformity, whilst in other areas Community legislation does not need to be adopted. Even if a piecemeal harmonisation of procedural rules according to the imperative of uniformity sounds a more realistic possibility, it still underestimates the need for judicial protection of individuals. When substantive Community rights have to be protected, procedural rules should apply irrespective of the nature of that right. In other words, the guarantee that procedural harmonised legislation can give (as it has done in the field of public procurement) should not depend on the specific Community rights or even the policy areas of the Community, but cover all Community rights that have been breached. In particular, Community legislative institutions should take action and formulate a more general system of interim protection before national courts, based on the principles that the European Court of Justice has developed through its revolutionary judgments and inspired from the existing national rules and effective harmonisation in some sectors of Community law.

¹⁶ D. Pachnou, *Enforcement of the E.C. Procurement rules: The Standards Required of National Review Systems under E.C. Law in the Context of the Principle of Effectiveness*, (2000) 9 P.P.L.R., p. 55; See also H.G. Schermers and D. F. Waelbroeck, *Judicial Protection in the European Union*, Kluwer Law International, Sixth Edition, 2001, p. 210-218

¹⁷ Council Directive 89/665 "on the co-ordination of the laws, regulations and administrative procedures relating to the application of review procedures to the award of public supply and public works contracts", [1989] O.J. L395/33; Council Directive 92/13 "on the co-ordination of the laws, regulations and administrative provisions relating to the applications of Community law on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors" [1992] O.J. L76/14

¹⁸ M. Dougan, *The Judicial Harmonisation of National Remedies and Procedural Rules in a Differentiated Europe*, held at the University Library, Cambridge, p. 202

It is clear that the European legal order has moved from national procedural autonomy to the combination of European procedural rules and national procedural law, leaving a wide margin for further development. It remains to be seen whether the Community will adopt a more concrete approach towards national remedies and provide adequate legislation in this field¹⁹. The absence of any provisions in the existing Treaty on the principle of effectiveness, the principle of supremacy and the duties of national courts to assess the compatibility of domestic rules with Community standards cannot justify the proper functioning of judicial protection. After a large number of judgments on national remedies, it seems time to incorporate the new guidelines in the Treaty in order to deal with the obstacles that national courts face when dealing with issues of procedural law²⁰. The power of national courts to grant interim relief derives from Community law and it is primordial to include express provisions in the Treaty²¹. Although the outcome at Nice showed the willingness on the part of the Member States to address serious judicial reform issues²², it remains to be seen how future proposals on harmonised procedural rules will be interpreted by the Community.

The Draft Treaty establishing a Constitution for Europe proposes a new framework for the needs of the citizens of Europe and the future development of the EU in the field of judicial protection²³. With respect to the legal protection of the individual, the first part of the Draft Treaty provides expressly into Article 28 the principle of effective protection, according to which the Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law²⁴. This proposal actually underlines the national courts' responsibility to provide all effective remedies for the protection of Community rights and aims to the

¹⁹ D. Waelbroeck, *Vers une nouvelle architecture judiciaire européenne?*, 2001 C.D.E., p. 6-7

²⁰ However the Draft Constitution has incorporated the principle of supremacy and effectiveness. Article 10(1) states that "*The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States*". Article 28(1) par. 2 states that "*Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law*".

²¹ For a draft on interim relief and other procedural rules before national courts see A. Dashwood and A. Ward (eds), *CELS (Cambridge) EC Treaty Project*, (1997) 22 EL Rev., p. 431

²² A. Dashwood and A. Johnston, *The Outcome at Nice: An Overview*, in *The Future of the Judicial System of the European Union*, edited by A. Dashwood and A. Johnston, Hart Publishing, 2001, p. 219; P.J.G. Kapteyn, *Reflections on the Future of the Judicial System of the European Union after Nice*, (2001) 20 Y.E.L., p. 174; A. Johnston, *Judicial Reform and the Treaty of Nice*, (2001) 38 CML Rev., p. 522

²³ See <http://www.european-convention.eu.int/bienvenue.asp?lang=EN>

²⁴ Document CONV 850/03, Draft Treaty establishing a Constitution for Europe, <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>

evolution of national procedural rules in order to eliminate existing lacunae in judicial protection against the Community measures²⁵. One waits with great anticipation to see how this constitutional reform can be effective to individuals before the European and national courts²⁶, particularly when bearing in mind that the Draft Treaty remains once more silent, when it comes to the imposition of specific guidelines as expressed in the Court of Justice's case-law on national remedies. Although the new provision facilitates the future reform of national legal systems, while respecting the national procedural rules²⁷, it does not provide the necessary prerequisites to overcome the existing uncertainties that the judge-made law on national remedies has created over the years.

It follows from above that the only desirable change can now occur via the political and legislative field. Both the EC Institutions and the Member States need to foresee what kind of European Union they want to form and what place will the citizens have in it. A European Union which strives to attach the highest importance to establishing an area of freedom, security and justice, will undoubtedly need to pay more attention to such issues of judicial protection, especially as the power of Community law to affect the lives of individuals continues to grow.

²⁵ Document CONV 221/02, Contribution by Mr. Jacob Söderman, European Ombudsman: "Proposals for Treaty changes", <http://register.consilium.eu.int/pdg/en/02/cv00/00221en2.pdf>

²⁶ M. Varju, *The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention*, E.P.L., Volume 10, Issue 1, p. 44. The author is convinced that the new European Constitution will fall behind citizens' expectations.

²⁷ Working Group II, Document 21, "The question of effective judicial remedies and access of individuals to the European Court of Justice", 1 October 2002, <http://european-convention.eu.int/docs/wd2/3299.pdf>

BIBLIOGRAPHY**BOOKS**

ALBORS-LLORENS A., *Private Parties in European Community Law. Challenging Community Measures*, Clarendon Press, Oxford, 1996

ALDOUS G. and ALDER J., *Applications for judicial review*, Butterworths, 1993

ANDENAS M. and JACOBS F., *European Community Law in the English Courts*, Clarendon Press, Oxford, 1998

ANDENAS M. and USHER J. (eds), *The Treaty of Nice and Beyond*, Hart Publishing, 2003

ANDERSON D. QC and DEMETRIOU M., *References to the European Court*, Sweet and Maxwell, London, 2002

ARNULL A., *The European Union and its Court of Justice*, Oxford University Press, 1999

BEAN D., *Injunctions*, FT Law and Tax, 7th edition, 1996

BEIS K., *The Effectiveness of Temporary Judicial Protection (in Greek)*, Law and Economics (in Greek), Sakkoulas, Athens, 1995

BERNHARDT R. (ed.), *Interim Measures Indicated by International Courts*, Springer-Verlag, 1994

BREALEY M. and HOSKINS M., *Remedies in EC Law*, Sweet and Maxwell, 2nd edition, 1998

BIICL (British Institute of International and Comparative Law), *The Role and Future of the European Court of Justice*, BIICL, 1996

BOSKOVITS K., *Le juge communautaire et l'articulation des compétences normatives entre la Communauté européenne et es Etats membres*, Sakkoulas/Bruylant, Athènes-Bruxelles, 1999

BRAIBANT G., *Le droit administratif français*, Presses de la Fondation nationale des Sciences Politiques et Dalloz, 3^{eme} édition, 1992

CAVALLINI J., *Le juge national du provisoire face au droit communautaire-les contentieux français et anglais*, Bruylant, Bruxelles, 1995

CHAPUS R., *Rapport de synthèse du colloque du 30^{ème} anniversaire des T.A.*, Grenoble, 1984

CHAPUS R., *Droit du Contentieux administratif*, Montchrestien, 4^{eme} édition, 1993

CHRISTIANOS V. (ed), Evolution récente du droit judiciaire communautaire, Volume 1, European Institute of Public Administrator, Maastricht, 1994

CRAIG P., Administrative law, 4th edition, Sweet and Maxwell, London, 1999

CRAIG P. and DE BÚRCA G., EU LAW: Text, Cases and Materials, Oxford University Press, Third edition, 2003

CRAIG P. and DE BÚRCA G., The Evolution of EU Law, Oxford University Press, 1999

CURTIN D. and HEUKELS T. (eds), Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers, Volume II, Martinus Nijhoff Publishers, 1994

CURTIN D. and O'KEEFFE D. (eds), Constitutional Adjudication in European Community Law and National Law, Butterworths, 1992

DASHWOOD A. and JOHNSTON A. (eds), The Future of the Judicial System of the European Union, Hart Publishing, 2001

DE BÚRCA G. and WEILER J.H.H. (eds), The European Court of Justice, Oxford University Press, 2001

DELICOSTOPOULOS C.S., L'encadrement processuel des autorités de marché en droits français et communautaire, L.G.D.J, Paris, 2002

DELICOSTOPOULOS I.S., Le process civil à l'épreuve du droit processuel européen, L.G.D.J, Paris, 2003

DELPÉRIÉE F., VERDUSSEN M., BIVER K., Recueil des Constitutions Européennes, Bryulant, Bruxelles, 1994

DE SMITH, WOOLF, JOWELL, Principles of Judicial Review, Sweet and Maxwell, London, 1999

FORDHAM M., Judicial Review Handbook, 2nd edition, John Wiley and Sons, 1997

GERARIS C., The provisional protection in public works, public supply and public services contracts (law 2522/97)(in Greek), Sakkoulas, Athens-Komotini, 1999

HARTLEY T.C., The Foundations of the European Community Law, US: Oxford (4th edition), 1998

HARTLEY T.C., Constitutional Problems of the European Union, Oxford, Hart Publishing, 1999

ISAAC G., Droit Communautaire General, Masson, Paris, 1992

- JACOBS F.G. and WHITE R.C.A., *The European Convention on Human Rights*, Clarendon Paperbacks, Oxford University Press, 1996
- KLAMARIS N.K., *The Right of Judicial Protection (in Greek)*, Sakkoulas, Athens, 1989
- KORAH V., *An Introductory Guide to EC Competition Law and Practice*, Hart Publishing, Eight Edition, 2004
- LASOK K.P.E., *The European Court of Justice. Practice and Procedure*, Butterworths, London, 1994
- LAZARATOS P., *The temporary judicial protection according to the Code of Administrative Procedure (in Greek)*, Sakkoulas, 2002
- LENAERTS K. and ARTS D., *Procedural Law of the European Union*, Sweet and Maxwell, London, 1999
- LEWIS C., *Judicial Remedies in Public Law*, 2nd edition, Sweet and Maxwell, London, 2000
- LEWIS C., *Remedies and the Enforcement of European Community Law*, Sweet and Maxwell, London, 1996
- LONBAY J. and BIONDI A. (eds), *Remedies for Breach of EC Law*, John Wiley and Sons, 1997
- MERTENS P., *le droit de recours effectif devant les instances nationales en cas de violation d'un droit de l'homme*, Editions de l'Université de Bruxelles, 1973
- MICKLITZ H-W. and REICH N. (eds), *Public Interest Litigation before European Courts*, Nomos Verlagsgesellschaft, 1996
- O'KEEFFE D. and BAVASSO A. (eds), *Judicial Review in European Union Law*, Kluwer Law International, 2000
- PACTEAU B., *Contentieux administratif*, P.U.F., 4eme édition, 1997
- PLIAKOS A., *Le principe général de la protection juridictionnelle efficace en droit communautaire*, Sakkoulas/Bruylant, Athènes-Bruxelles, 1997
- PRINSSSEN J.M. AND SCHRAUWEN A., *Direct Effect Rethinking a Classic Of EC Legal Doctrine*, Europa Law Publishing, 2002
- REMELIS K., *The application for interim measures before the Council of State (in Greek)*, Sakkoulas, Athens-Thessaloniki, 2000
- SCHERMERS H., *Judicial Protection in the European Communities*, 3rd edition, Kluwer Publishers Deventer- The Netherlands, 1983

SCHERMERS H.G. and WAELBROECK D.F., *Judicial Protection in the European Union*, Kluwer Law International, Sixth Edition, 2001

SCHWARZE J., *European Administrative Law*, Sweet and Maxwell, London, 1994

SIMON D., *Le système juridique communautaire*, Presses universitaires de France, 2nd édition, 1998

SLAUGHTER A-M, STONE SWEET A., WEILER J.H.H., *The European Courts and National Courts-Doctrine and Jurisprudence*, Hart Publishing, Oxford, 1998

SKOURIS V., *The suspension of enforcement of administrative measures (in Greek)*, 3rd edition, Sakkoulas, Athens, 1994

SPILIOTOPOULOS E., *Administrative Law (in Greek)*, 10th edition, Sakkoulas, Athens, 2000

TRIDIMAS T., *The General Principles of EC Law*, Oxford University Press, 1999

USHER J., *European Court Practice*, Sweet and Maxwell, 1983

VANDERSANDEN G. and BARAV A., *Contentieux communautaire*, Bruxelles, Bruylant, 1977

VAN DIJK P. and VAN HOOFF G.J.H., *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, Third edition, 1998

WARD A., *Judicial Review and the Rights of Private Parties in EC Law*, Oxford University Press, 2000

WERLAUFF E., *Common European Procedural Law*, PJØF Publishing Copenhagen, 1999

WHISH R., *Competition Law*, Fifth Edition, Lexis Nexis, Butterworths, 2003

ARTICLES

ALBORS-LLORENS A., note on Case C-68/95, T-Port GmbH and Co. KG v. Bundesanstalt für Landwirtschaft und Ernährung [1996] ECR I-6065, (1998) 35 CML Rev., p. 227

ALDER J., Public and Private law remedies against the Crown and its servants; the question of interim relief, *Civil Justice Quarterly*, 1986, vol.5, p.218

ALDER J., Interim Relief against the Crown, *M.L.R.*, 1987 Jan., Vol.50, p.105

- ALGAZY J., "The Crown, interim relief and EEC law" (1991) N.L.J, p. 1303
- ALLOTT P., Parliamentary sovereignty- From Austin to Hart, Cambridge Law Journal, Vol. 49, part 3, November 1990, p. 377
- APTER S., Interim Measures in EC Law: Towards a Complete and Autonomous System of Provisional Judicial Protection before National Courts? EJCL Vol. 7.2, June 2003
- ARNULL A., National Courts and the Validity of Community Acts (1988) 13 EL Rev., p. 125
- ARNULL A., Private Applicants and The Action for Annulment Under Article 173 of the EC Treaty, (1995) 32 CML Rev., p.7
- ARNULL A., Rights and Remedies: Restraint or Activism?, in Remedies for Breach of EC Law, edited by J. Lonbay and A. Biondi, John Wiley and Sons, 1997, p. 15
- ARNULL A., Challenging Community Acts- An Introduction, in Public Interest Litigation before European Courts, H-W. Micklitz and N. Reich (eds), Nomos Verlagsgesellschaft, 1996, p. 39
- ARNULL A., Private Applicants and the Action for Annulment since Cordoniu, (2001) 38 CML Rev., p.7
- BARAV A., Enforcement of Community rights in the national courts: The case for jurisdiction to grant an interim relief, (1989) 26 CML Rev., p.369
- BARAV A., "Interim relief and English law", (1990) NJL, p. 899
- BARAV A., "La plénitude de compétence du juge national en sa qualité de juge communautaire" in L'Europe et le droit, Mélanges J. Boulois 1991, p. 1
- BARAV A. et SIMON D., Le droit communautaire et la suspension provisoire des mesures nationales. Les enjeux de l'affaire Factortame, (1990) R.M.C., no 340, p.591
- BARAV A., Omnipotent Courts, in Institutional Dynamics of European Integration, Essays in honour of H.G. Schermers, edited by D. Curtin and T. Heukels, 1994, p. 265
- BARAV A., The Effectiveness of Judicial Protection and the Role of the National Courts, in Judicial Protection of Rights in the Community Legal Order, Bruylant, Bruxelles, 1997, p. 259
- BARNARD C. and GREAVES R., "The application of Community law in the United Kingdom, 1986-1993", (1994) 31 CML Rev., p. 1055
- BARNARD C. and SHARPSTON E., The Changing Face of Article 177 References, (1997) 34 CML Rev., p.1113

- BEATSON J., Public and private rights in English administrative law, L.Q.R., 1987, p.34
- BEBR G., Agreements Concluded by the Community and Their Possible Direct Effect: From International Fruit Company to Kupferberg, (1983) 20 CML Rev., p. 35
- BEBR G., note on Cases C-465 and Cc-466/93, Atlanta Fruchthandel Gesellschaft and Others v. Bundesamt für Ernährung and Forstwirtschaft, (1996) 33 CML Rev., p. 795
- BEBR G., Court of Justice : Judicial Protection and the Rule of Law, in Institutional Dynamics of European Integration, Essays in honour of H.G. Schermers, edited D. Curtin and T. Heukels, 1994, p. 303
- BEBR G., The Reinforcement of the Constitutional Review of Community Acts under Article 177 EEC Treaty (Cases 314/85 and 133 to 136/85), (1988) 25 CML Rev., p. 667
- BELL J., "Sur les pouvoirs du juge Britannique d'adresser des injonctions à la Couronne" (1990) RFDA, p. 920
- BERRI M., The Special Procedures before the Court of Justice of the European Communities, (1971) 8 CML Rev., p.7
- BIONDI A., The European Court of Justice and Certain national Procedural Limitations; Not Such a Tough Relationship, (1999) 36 CML Rev., p. 1271
- BIONDI A., Case C-253/00, Antonio Muñoz y Cia, Superior Fruiticola SA v. Frumar Ltd, Redbridge Produce Marketing Ltd, Judgment of the Full Court of 17 September 2002, [2002] ECR I-7289, (2003) 40 CML Rev., p. 1241
- BIRKINSHAW P., A Constitution for the European Union ?- A Letter from Home, E.P.L., March 2004, Volume 10, Issue 1, p. 57
- BONICHOT J.C., "Les pouvoirs d'injonction du juge national pour la protection des droits conférés par l'ordre juridique communautaire." (1990) RFDA, p. 912
- BONTINCK B., La protection du justiciable grâce à l'application par le juge national du droit communautaire, in Judicial Protection of Rights in the Community Legal Order, Bruylant, Bruxelles, 1993, p.177-183
- BORCHARDT G., The award of interim measures by the European court of Justice, (1985) 22 CML Rev., p.203
- BOYRON S. and BROWN L.N., "L'affaire Factortame: droit communautaire contre droit public anglais", (1994) RFDA, p. 70
- BRIDGE, Procedural aspects of the enforcement of European community law through the legal systems of the Member States, (1984) 9 EL Rev., p.28

CAMPELL A.I.L., "adrift on a Sea of Community Law?" (1991) SLT, p. 89

CANIVET G. et HUGLO J-G., L'obligation pour le juge judiciaire national d'appliquer d'office le droit communautaire au regard des arrêts Jeroen van Schindel et Peterbroeck, Europe (Revue mensuelle) 1996, No 4, p.1

CARANTA R., Judicial Protection against Member States: A new 'jus commune' takes shape, (1995) 32 CML Rev., p.703

CHURCHILL R., Fisheries: can quota hopping be stopped? (1989) 14 EL Rev., p. 470

COLLINS A.M., The Availability of Interim Relief in National Courts to Uphold Community Law Rights, (1992) Ir.J.E.L., p. 60

COMBREXELLE J-D, L'impact de l'arrêt de la Cour: étendue et limites des pouvoirs du juge national, in Evolution récente du droit judiciaire communautaire, Volume 1, edited by Vassilis Christianos, European Institute of Public Administrator, Maastricht, 1994, p.113

CONSTANTINESCO V., L'article 5 CEE de la bonne foi à la loyauté communautaire, in Du Droit International au droit de l'intégration: Liber Amicorum Pierre Pescatore, edited by Capotorti, C-D. Ehlermann, J. Frowein, F. Jacobs, R. Joliet, T. Koopmans, R. Kovar, Nomos Verlagsgesellschaft, Baden-Baden, 1987, p. 97

COOKE J., *Locus Standi* of private parties under Article 173(4), 1997 I.J.E.L., p. 4

CRAIG P.P., Directives: Direct Effect, Indirect Effect and the Construction of National Legislation, (1997) 22 EL Rev., p. 291

CRAIG P.P., "Sovereignty of the United Kingdom Parliament after Factortame", (1991) 11 YEL, p. 221

CRAIG P.P., The Jurisdiction of the Community Courts Reconsidered, in The European Court of Justice, edited by G. De Búrca and J.H.H. Weiler, p. 202

CRAUFURD SMITH R., Remedies for Breach of EC Law in National Courts: Legal Variation and Selection, in The Evolution of EU Law, edited by P. Craig and G. de Búrca, US; Oxford University Press, p. 287

CURTIN D. and MORTELMANS K., Application and Enforcement of Community Law by the Member States: Actors in Search of a Third Generation Script, in Institutional Dynamics of European Integration, Essays in honour of H.G Schermers, edited by D. Curtin and T. Heukels, 1994, p. 423

CURTIN D., The Decentralised Enforcement of Community law Rights. Judicial Snakes and Ladders, in Constitutional Adjudication in European Community and National Law, edited by D. Curtin and D. O'Keeffe, Butterworths, 1992, p. 33

- CURTIN D., Directives: The effectiveness of judicial protection of individual rights, (1990) 27 CML Rev., p. 709
- DASHWOOD A. and WARD A., CELS (Cambridge) EC Treaty Project, (1997) 22 EL Rev., p. 431
- DASHWOOD A. and JOHNSTON A., The Outcome at Nice: An Overview, in The Future of the Judicial System of the European Union, edited by A.Dashwood and A.Johnston, Hart Publishing, 2001, p. 219
- DÄNZER-VANOTTI W., Der Gerichtshof der Europäischen Gemeinschaften beschränkt vorläufigen Rechtsschutz, Der Betriebs-Berater, 1991, p.1015
- DE BÚRCA G., National Procedural Rules and Remedies: The Changing Approach of the Court of Justice, in Remedies for Breach of EC Law, edited by J. Lonbay and A. Biondi, John Wiley and Sons, 1997, p. 37
- DE LA SIERRA S., Provisional Court Protection in Administrative Disputes in Europe : The Constitutional Status of interim Measures Deriving from the Right to Effective Court Protection. A Comparative Approach, ELJ, Vol. 10, No 1, January 2004, p. 42
- DE WILMARS M., L'efficacité des différentes techniques nationales de protection juridique contre les violations du droit communautaire par les autorités nationales, in Remedies for breach of Community law, Vol. I, F.I.D.E., Sweet and Maxwell, London 1980, p. I.1
- DE WITTE B., Direct Effect, Supremacy and the Nature of the Legal Order, in the Evolution of EU Law, edited by P. Craig and G. De Burca, p. 177
- DELICOSTOPOULOS J.S., Towards European Procedural Primacy in National Legal Systems, European Law Journal, Volume 9, Issue 5, p. 599
- LORD DONALDSON, "Can the Judiciary control Acts of Parliament" (1991) The Law Teacher, p. 4
- DOUGAN M., The Judicial Harmonisation of National Remedies and Procedural Rules in a Differentiated Europe, held at the University Library, Cambridge
- DRAI P., Pour un juge qui toujours décide, G.P., 1987, chro., p. 512
- DREXL J., Was Sir Francis Drake a Dutchman ?-British Supremacy of Parliament After *Factortame*, The American Journal of Comparative Law, 1993, Vol. 41, p. 551
- ELEFThERIADIS P., The Direct Effect of Community Law : Conceptual Issues, (1996) 16 YEL, p. 205
- ESTOUP P., Le référé, verdict du culpabilité, G.P., 1998, doc., p.203

EVERLING U., The Member States of the European Community before their Court of Justice, (1984) 9 EL Rev., p.215

EVERLING U., On the Judge-Made Law of the European Community's Courts, in Judicial Review in European Union Law, edited by D.O'Keeffe and A.Bavasso, Kluwer Law International, 2000, p. 29

FEVRIER J.M., La jurisprudence communautaire et le contentieux administrative du sursis à execution, L'Actualite juridique-Droit administratif, decembre 1995, p. 867

FLAUSS J.F., "French Report", in Administrative law under European influence: on the convergence of the administrative laws of the EU member states, edited by J. Schwarze, London 1996, p. 83

FLOGAITIS S., Mesures conservatoires et effet suspensif dans la procedure administrative, in general reports-XIVth International Congress on Comparative Law, Athens 1994, edited by K. Kerameus, Kluwer Law International, 1996, p. 735

FOURGOUX J-C., La Cour de justice des Communautés européennes et les pouvoirs du juge national en matière de mesures provisoires, note sous CJCE, 19 juin 1990, Recueil Dalloz Sirey, no 39, 22 novembre 1990, p.547

FRIEDEL E. and LE BRETON G., Interim and Substantive Relief in Community Antitrust Cases: The Practice of the French Competition Council and the French Courts, (1997) 22 EL Rev., p.327

GARCIA E. A., Is Europe ready for the administrative law remedial revolution?- Litigation before national Courts of the EEC Member States and interim relief, Administrative Law Review, 1990, Vol. 42, p. 181

GARCIA DE ENTERRIA E., The extension of the Jurisdiction of national Administrative Courts by Community Law: The Judgment of the Court of Justice in Borelli and Article 5 of the EC Treaty, (1993) YEL, p.19

GAUDEMET Y., Les procédures d'urgence dans le contentieux administratif, RTDA, 1988, p.420

GILLIAUX P., L' arrêt Unión de Pequeños Agricultores : Entre subsidiarité juridictionnelle et effectivité, (2003) C.D.E., p. 177

GOFFIN L., De l'incompétence des juridictions nationales pour constater l'invalidité des actes d'institutions communautaire, (1990) C.D.E, p. 216

GRAVELLS N.P., "Displaying on Act of Parliament pending a preliminary ruling: constitutional enormity or Community law right" (1989) Public Law, p. 568

GRAVELLS N.P., "Effective protection of Community law rights: temporary disapplication of an act of parliament", (1991) Public Law, p. 180

- GRAY C., Interim Measures of Protection in the European Court, (1979) 4 EL Rev., p.80
- GREVISSE F. and BONICHOT J-C., "Les incidences du droit communautaire sur l'organisation et l'exercice de la fonction juridictionnelle dans les Etats membres", Mélanges Boulois, 1991, p.297
- GUIDANCE on References by National Courts for Preliminary Rulings, [1997] 1 CMLR, p. 78
- HANNA J., Community rights all at Sea, (1990) LQR, p. 2
- HARDING, The Private interest in challenging Community action, (1980) 5 EL Rev., p. 354
- HARDCASTLE I., Interim measures in Proceedings Concerning EC Law: New Departures, EBLR, April 1994, p. 95
- HIGGINS I., Equal Treatment and national procedural rules: one step forward, two steps back, Irish Journal of European Law, 1995, Vol. 4, No 1, p. 18
- HIMSWORTH C., Things fall apart: the harmonisation of judicial procedural protection revisited, (1997) 22 EL Rev., p. 291
- HOSKINS M., Titling the Balance: Supremacy and National Procedural rules, (1996) 21 EL Rev., p.365
- JACOBS F., Enforcing Community Rights and Obligations in national Courts: Striking the Balance, in Remedies for Breach of EC Law, edited by J. Lonbay and A. Biondi, John Wiley and Sons, 1997, p. 25
- JACOBS F., Access to justice as a fundamental right in European Law, in Melanges en homage a Fernand Schockweiler, 1999, p. 197
- JACOBS F., Effective Judicial Protection of individuals in the European Union, Now and in the Future, in The Treaty of Nice and Beyond, edited by M. Andenas and J. Usher, Hart Publishing, p. 335
- JOHNSTON A., Judicial Reform and the Treaty of Nice, (2001) 38 CML Rev., p. 499
- JOLIET R., Protection juridictionnelle provisoire et droit communautaire. Rivista di diritto europeo, Rome, no 2/1992, p.253
- KAKOURIS C.N., Do the Member States possess judicial procedural "autonomy"?, (1997) 34 CML Rev., p. 1389
- KAPTEYN P.J.G., Reflections on the Future of the Judicial System of the European Union after Nice, (2001) 21 YEL, p. 173

KILPATRICK C., Turning Remedies Around : A Sectoral Analysis of the Court of Justice, in *The European Court of Justice*, edited by G. De Búrca and J.H.H. Weiler, Oxford University Press, p. 143

KINDER-GEST P., "Primauté du droit Communautaire et droit Anglais ou comment concilier l'inconciliable" (1991) RAE, p. 19

KOVAR R., Droit Communautaire et droit procédural national, note sous Rewe/Commet, (1977) C.D.E., p.227

KOVAR R., "Le droit national d'exécution du droit communautaire, essai d'une théorie de l'écran communautaire". (1991) Mélanges Boulois, p. 341

KOVAR R., Voies de droit ouvertes aux individus devant les instances nationales en cas de violation des normes et décisions du droit communautaire, Colloque: les recours des individus devant les instances nationales en cas de renvoi préjudiciel, A.J.D.A., Paris, No 11, p.832

KRISLOV, EHLERMANN and WEILER, The political organs and the decision-making process in the United States and the European Community, in *Integration through Law*, Vol 1, Methods, Tools and Institutions, Book 2 : Political Organs, Integration techniques and judicial process, Berlin, 1986, p. 3

LABAYLE H., "L'effectivité de la protection juridictionnelle des particuliers", (1992) RFDA, p. 619

LAURENT P., La Fonction communautaire du juge judiciaire des référés, Gazette du Palais, 1984, nos 342-343, p. 5

LE MIRE P., Droit découlants des dispositions communautaires: Compétence des juridictions nationales pour ordonner des mesures provisoires en cas de renvoi préjudiciel, A.J.D.A., 1990, p.832

LE MIRE P., note sous C.J.C.E., *Zuckerfabrik*, A.J.D.A., 1991, p. 237

LENAERTS K., The Development of the Judicial Process in the European Community after the Establishment of the Court of First Instance, in Clapham (ed), *Collected Courses of the Academy of European Law*, 1990 Vol I-1, p. 53

LENAERTS K., Some Thoughts about the Interaction between Judges and politicians in the European Community, (1992) 12 YEL, p. 1

LENAERTS K., The Legal Protection of Private Parties under the EC Treaty: a Coherent and Complete System of Judicial Review, Scritti in onore di Giuseppe Federico Mancini, Milan, Giuffrè editore, 1998, II, p. 591

MAGLIVERAS K.D., "The effects of Factortame" (1990) SLT, p. 341

MARTIN J., Interlocutory Injunctions: *American Cyanamid* comes of Age, King's College Law Journal, (1993-1994), vol.4, p. 52

MATTHEWS M.H., Injunctions, interim relief and proceedings against the Crown servants, O.J.L.S., 1988, Vol.8, p. 154

MEDHI R., Le droit communautaire et les pouvoirs du juge national de l'urgence (quelques enseignements d'une jurisprudence récente), (1996) 32 RTDE, p.77

MONGIN B., Le juge national et les mesures provisoires ordonnées en vertu du droit communautaire, in Christianos (ed), Evolution récente du droit judiciaire communautaire, Maastricht, European Institute of Public Administration, 1994, p. 125

NETTESHEIM M., Article 173 of the EC Treaty and Regulations: Towards the Development of Uniform Standing Requirements, in Public Interest Litigation before European Courts, H-W. Micklitz and N. Reich (eds), Nomos Verlagsgesellschaft, p. 225

NEUWAHL N.A., Article 173 Paragraph 4 EC Past, Present and Possible Future, (1996) 21 EL Rev., p. 17

NIHOUL P., La recevabilité des recours en annulation introduits par un particulier à l'encontre d'un acte communautaire de portée générale, (1994) 30 RTDE., p. 171

O'KEEFFE D., General Course in European Community Law. The Individual and European Law, in Collected Courses of the Academy of European Law, Volume V, Book 1, p. 55

OLIVER D., Fishing on the incoming tide, (1991) MLR, p. 442

OLIVER P., Le droit communautaire et les voies de recours nationales, (1992) C.D.E., p. 348

OLIVER P., Interim Measures: Some Recent Developments, (1992) 29 CML Rev., p.7

PACHNOU C., Enforcement of the EC Procurement rules: The Standards Required of national Review System under EC Law in the Context of the principle of Effectiveness, 9 P.P.L.R. (2000) No 2, p. 55

PAPADIAS L., Interim Protection under Community Law before the National Courts. The Right to a Judge with Jurisdiction to Grant Interim Relief, L.I.E.I., 1994/2, p. 153

PASTOR B. and VAN GINDERACHTER E., La procédure en référé, (1989) 25 RTDE., p. 561

PESCATORE P., The Doctrine of "Direct Effect" : An Infant Disease of Community Law, (1983) 8 EL Rev., p. 155

PRECHAL S., Community law in national Courts: The Lessons from van Schijndel, (1998) 35 CML Rev., p.681

PRECHAL S., EC Requirements for an Effective Remedy, in Remedies for Breach of EC Law, edited by J. Lonbay and A. Biondi, John Wiley and Sons, 1997, p. 3

PRECHAL S., Does Direct Effect still matter, (2000) 37 CML Rev., p. 1047

RAGOLLE F., Access to justice for private applicants in the Community legal order: recent (r)evolutions, (2003) 28 EL Rev., p. 90

RAIKOS D., Interim Measures in the Code of Administrative Procedure (in Greek), Dike International 2003 (34), p. 791

RASMUSSEN H., Remedying the Crumbling EC Judicial System, (2000) 37 CML Rev., p. 1071

REICH N., Public Interest Litigation before European Jurisdictions, in Public Interest Litigation before European Courts, H-W. Micklitz and N. Reich (eds), Nomos Verlagsgesellschaft, 1996, p. 3

REICH N., Judge made 'Europe à la carte' Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation, EJIL, Vol. 7, (1996), No. 1, p. 103

ROBERTSON A., Effective remedies in EEC Law before the House of Lords, Law Quarterly Review, 1993, p. 27

RODFORD P.B., "Le premier conflit réel entre droit communautaire et droit constitutionnel britannique : L'arrêt *Factortame*", (1991) G.P., nos 69-71, doc., p. 9

ROSS M., "Refining effective enjoyment", (1990) 15 EL Rev, p. 476

SCHERMERS H.G., note on Joined Cases C-143/88 and C-92/89, Zuckerfabrik Süderdithmarchen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn, Preliminary ruling of 21 February 1991, (1992) 29 CML Rev., p. 133

SCHWARZE J., "Tendencies towards a Common Administrative Law in Europe" (1991) 16 EL Rev., p. 3

SCHWARZE J., The Procedural Guarantees in the Recent Case-law of the European Court of Justice, in Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers, Volume II, edited by D. Curtin and T. Heukels, Martinus Nijhoff Publishers, p. 487

SCHWARZE J., The Role of the European Court of Justice in Shaping Legal Standards for Administrative Action in the Member States. A comparative Perspective, in Judicial Review in European Union Law, edited by D. O'Keeffe and A. Bavasso, Kluwer Law International, 2000, p. 447

SCHWARZE J., Guest Editorial: The Convention's Draft Treaty establishing a Constitution for Europe, (2003) 40 CML Rev., p. 1037

SHARPSTON E., Interim Relief in the National Courts, in Remedies for Breach of EC Law, edited by J. Lonbay and A. Biondi, John Wiley and Sons, 1997, p. 47

SINANOTIS D., The Plea of Illegality in EC Law, E.P.L., 2001, Volume 7, Issue 1, p. 103

SLUSNY M., Les mesures provisoires dans la jurisprudence de la Cour de justice des Communautés Européennes, Rev.Belge de Droit international (1967), p.127

STEFANOU C. and XANTHAKI H., Are National Remedies the Only Way Forward ? Widening the Scope of Article 215(2) of the Treaty of Rome, in Remedies for Breach of EC Law, edited by J. Lonbay and A. Biondi, John Wiley and Sons, 1997, p. 85

STEFANOU C. and XANTHAKI H., Article 224 of the treaty of Rome and the Repercussions of Case C-120/94, Web JCLI [1995] 3

STRUYS M., Le droit communautaire et l'application des règles procédurales nationales, JT, 2000 mars, No 67, p.49

SZYSZCZAK E., "Sovereignty: crisis, compliance, confusion, complacency?" (1990) 15 EL Rev., p. 480

TATHAM A., "Les recours contre les atteintes portées aux normes communautaires par les pouvoirs publics en Angleterre", (1993) C.D.E., p. 597

TEMPLE LANG J., Community Constitutional Law: Article 5 EEC Treaty, (1990) 27 CML Rev., p.645

TEMPLE LANG J., The Duties of National Authorities Under Community Constitutional Law, (1998) 23 EL Rev., p. 109

TEMPLE LANG J., The Principle of Effective Protection of Community Law Rights, in Judicial Review in European Union Law, edited by D. O'Keeffe and A. Bavasso, Volume I, Kluwer Law International, 2000, p. 235

TEMPLE LANG J., The duties of cooperation of national authorities and Courts under Article 10 E.C.: two more reflections, (2001) 26 CML Rev., p. 84

TESAURO G., The effectiveness of Judicial Protection and Co-operation between the Court of Justice and the National Courts, (1993) 13 YEL, p. 1

TOTH A.G., Case C-213/89, Regina v. Secretary of State for Transport, ex parte Factortame Limited and Others, (1990) 27 CML Rev., p. 573

TRIDIMAS T., Case C-12/95 P, Transacciones Maritimas SA (Tramasa), Makuspesca SA and Recursos Marinos SA v. Commission, [1995] ECR I-467, (1996) 33 CML Rev., p. 371

TRIDIMAS T., The Court of Justice and Judicial Activism, (1996) 21 EL Rev., p. 199

TRIDIMAS T., Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure, (2003) 40 CML Rev., p. 9

USHER J.A., Presenting a Case before the European Court, (1976) 1 EL Rev., p.109

USHER J.A., Direct and individual concern- an effective remedy or a conventional solution ?, (2003) 28 EL Rev., p. 575

VANDERSANDEN G., Pour un élargissement du droit des particuliers d'agir en annulation contre des actes autres que des décisions qui leur sont adressées, (1995) C.D.E., p. 535

VAN GERVEN W., Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies, (1995) 32 CML Rev., p.679

VAN GERVEN W., Comparative law in a texture of Communitarization of National laws and Europeanization of Community Law, in *Judicial Review in European Union Law*, edited by D. O'Keeffe and A. Bavasso, Kluwer Law International, 2000, p. 433

VAN GERVEN W., Of Rights, Remedies and Procedures, (2000) 37 CML Rev., p. 1

VAN GIRENDERACHTER E., Référé, in *Dictionnaire juridique des communautés Européennes*, edited by A.BARAV and C.PHILIP, P.U.F., p.911

VARJU M., The Debate on the Future of the Standing under Article 230(4) TEC in the European Convention, E.P.L., 2004, Volume 10, Issue 1, p. 44

VOSS R., The national perception of the Court of First Instance and the European Court of Justice, (1993) 30 CML Rev., p. 1119

WAELEBROECK D., Vers une nouvelle architecture judiciaire européenne?, (2001) C.D.E., p. 3

WAINWRIGHT R., European Communities. Institutional and Jurisdictional Questions, judicial review/ Article 186 EEC: Interim measures and Member States, (1977) 2 EL Rev., p.349

WADE A.W.R., Injunctive Relief against the Crown and ministers, L.Q.R., 1991, p.4

WARD A., More than an "Infant Disease": Individual Rights, EC Directives and the Case of Uniform Remedies, in *Direct Effect Rethinking a Classic of the EC legal Doctrine*, edited by J.M. Prinssen and A. Schrauwen, Europa Law Publishing, 2002, p. 43

WARD A., Amsterdam and Amendment to Article 230: an opportunity lost or simply deferred?, in *The Future of the Judicial System of the European Union*, edited by A. Dashwood and A. Johnston, Hart Publishing, 2001, p. 37

WYATT D. QC, The Relationship between actions for Annulment and References on Validity after TWD Dewggendorf, in *Remedies for Breach of EC Law*, edited by J. Lonbay and A. Biondi, 1997, p. 55

ZUCKERMAN A.A.S., Interlocutory injunctions on the merits, *L.Q.R.*, 1991, p. 196

ZUCKERMAN A.A.S., Quality and Economy in Civil Procedure- The case for Commuting Correct Judgments for Timely Judgments, *O.J.L.S.*, 1994, Vol 14, No 3, p. 353

ZUCKERMAN A.A.S., Interlocutory Remedies in Quest of Procedural Fairness, (1993) *M.L.R.*, Vol 56, p. 325